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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID YOST, Petitioner,

vs.

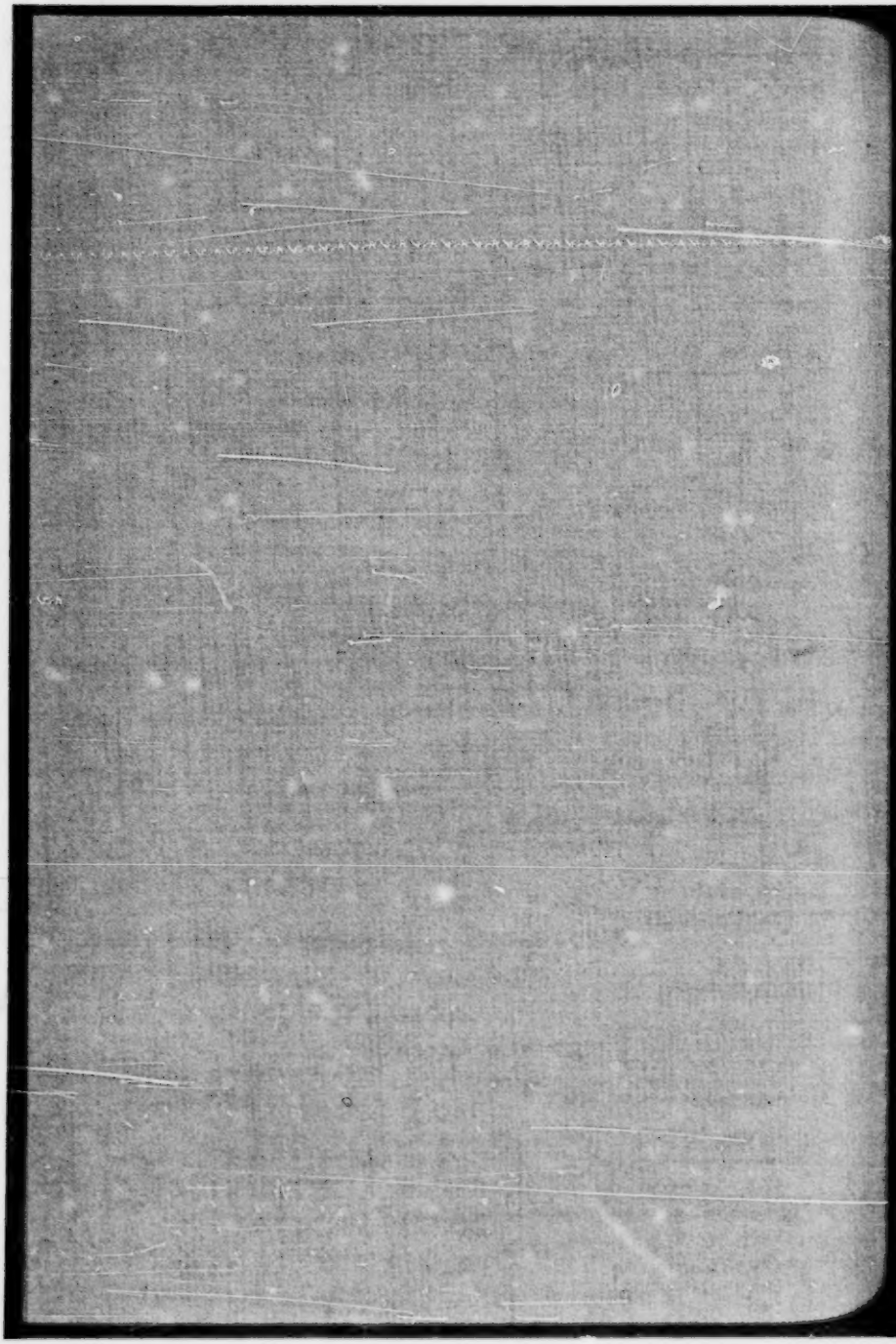
DALLAS COUNTY, Respondent.

No. 604.

Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit, to Require the Whole Record and Cause to Be Sent Up to the Supreme Court, Together With Copy of Certificate of Said Court of Appeals.

HARRY J. CANTWELL,
Counsel for Petitioner.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.



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Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit, to Require the Whole Record and Cause to Be Sent Up to the Supreme Court, Together With Copy of Certificate of Said Court of Appeals.

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, David Yost, states:

That in a certain cause in equity entitled David Yost, appellant, versus Dallas County, appellee, then pending in the United States Circuit Court of Appeals for the Eighth Circuit, the Honorable Judges of said Circuit

Court of Appeals have certified to this court, which certificate is docketed for this term, certain questions or propositions of law concerning which said Circuit Court of Appeals desires the instructions of this court for the proper decision of said Court of Appeals.

That a copy of said certificate is appended hereto and made a part of this petition. That there is submitted herewith a certified copy of the transcript of the record, including all proceedings in said Circuit Court of Appeals.

That the whole cause of action and entire controversy is shown by the pleadings; that, as stated, and in addition to the facts stated in the certificate of the said Eighth Circuit Court of Appeals, the record shows that this is a proceeding in equity by creditors bill, brought by a citizen of Pennsylvania for the benefit of himself and others—citizens of States other than Missouri—against a municipal corporation of Missouri; that all of such creditors are owners of judgments previously obtained at law in the same United States District Court where this suit in equity is maintained; that there are no other judgment creditors of said municipal corporation; that all remedies at law upon said judgments have been exhausted and proven ineffective; that all of said judgments were founded upon certain bonds of said municipal corporation specially authorized to be issued by the Legislature of the State of Missouri; that a special fund was authorized by the laws

of Missouri to be levied by taxation against certain definite specific property for the payment of said bonds; that the valuations of said definite specific property have been made; that a definite specific charge upon said property was created by the Legislature of Missouri for the payment of said bonds; that the respective acts necessary to raise such fund were required by the laws of the State of Missouri to be performed by the agents of said municipality; that power was conferred upon the judiciary of the State of Missouri to compel the specific performance of such acts by the agents of said municipal corporation; that said agents have heretofore refused to perform such acts in violation of their oaths of office; that by reason of the defaults of the agents of the said municipal corporation, the special tax authorized to be levied in any one year will be insufficient to pay all of such judgments in full; that all of said judgment creditors are entitled to pro-rata distribution of said fund when raised; that many writs of *mandamus* have been issued ordering the levy of a tax to pay said judgments; that special levies of taxes, to the maximum in any one year, have been heretofore ordered to be made; that said writs of *mandamus* and mandatory orders have been disobeyed and treated with contempt by the officers and agents of the municipal corporation; that attachments for contempt against said officers and agents have been repeatedly issued and

have proven ineffective to compel obedience to the orders of said United States District Court.

The bill further alleges that no act requiring the exercise of discretion by any of the officers and agents of said municipal corporation remains to be performed in order to make effective the lien and charge of said debts against certain definite specific property, and that the only acts necessary to be performed to make available for such creditors such fund so created by the taxing power of the State of Missouri are certain ministerial or clerical duties, which duties the laws of the State of Missouri and the oaths of office of such agents require them to perform.

The bill prays for an accounting between the creditors; for a continuing mandatory injunction; that equity consider certain acts as already performed which by law should have been performed; that substitutes, officers of the court, be appointed to perform certain ministerial and clerical duties necessary to make available such funds so already authorized by the laws of the State of Missouri for the common benefit of said judgment creditors; that said funds when raised be ratably distributed; and for all other proper equitable relief.

Your petitioner believes that there is here stated a sufficient ground for equitable jurisdiction under the practice and ancient precedents of equity courts and that while the certificate states, as petitioner believes,

full and adequate grounds for the exercise of equitable jurisdiction, yet the creditors' bill feature of the controversy is not stated in said certificate of said Judges of the Circuit Court of Appeals.

Your petitioner believes from the oral rulings at the argument that the Honorable Judges of the Circuit Court of Appeals are agreed upon this feature of the controversy, yet the statement thereof is omitted from the first question certified, and may be material to the consideration of such first question, as stated.

Your petitioner further states that while the said certificate of questions of law and the statement of facts preceding same fully show grounds for equitable jurisdiction and sufficient facts to justify the granting of the relief specially asked, yet your petitioner believes that all doubts as to the power and jurisdiction of the United States District Court to proceed herein and to the award of full relief as specifically prayed would be resolved by this honorable court in favor of this petitioner had the certificate more fully stated the laws of the State of Missouri cited in the briefs and fully discussed in the oral argument below, whereby it was shown that upon the case stated a litigant in the State courts would be entitled, under the laws of the State of Missouri and the construction thereof by the highest courts of that State, to the exercise of the judicial power of the State to the end that specific performance of the acts necessary to make available these funds for

the judgment creditors might be accomplished, and to the specific relief prayed; from which it would follow that as, in the exercise of its undoubted power and jurisdiction to administer justice between citizens of different States, the United States courts are empowered "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," and that, if necessary to such exercise of such jurisdiction, a writ be issued, the **objection cannot be raised that such writ is not agreeable to the usages and principles of law if in similar cases the judiciary of the State of Missouri might issue such writ.**

Your petitioner further shows the Court that as upon the facts stated, equity would undoubtedly have jurisdiction if the defendant were a private business corporation, the jurisdiction can be questioned and specific relief denied only upon the ground that this proceeding may be, in some way, an interference by the judiciary with the powers of another department of government. That in the consideration of such questions it is material that the highest courts of the State of Missouri have held that where rights of creditors are undoubted, to funds to be raised by taxation by a municipal corporation, the agents of said municipal corporation are as subject to control by the judiciary of the State as are servants of a private corporation.

That the judiciary of the State of Missouri is, by the laws of said State, given full power and control over all matters of taxation and revenue, of all rights of tax debtors and tax creditors, and of all rights growing out of or dependent thereon, after the taxing power is once exercised by the Legislature, which taxing power has already been exercised in this case; that such facts are conclusive upon the question of whether or not, within such State of Missouri, the exercise of the same powers by the judges of the United States courts, in a cause wherein the constitution and laws of the United States have conferred jurisdiction, would constitute an unwarranted interference with the powers of another department of government.

That the second question certified omits the statement that the judiciary of the State of Missouri is so empowered by the State, and omits to state that the judiciary of the State has so construed the duties of such agents of municipalities.

The questions so certified, therefore, not embracing all of the factors necessary to a full determination of the question or propositions involved in the case, and the statement of the proposition of law not fully embracing the facts involved in such propositions, your petitioner humbly prays this Court to require the whole record and cause to be sent to this court for its consideration.

HARRY J. CANTWELL,
Counsel for David Yost, Petitioner.

Certificate of U. S. Court of Appeals referred to in foregoing petition:

United States Circuit Court of Appeals, Eighth Circuit.
May Term, A. D. 1914.

David Yost, Appellant,
vs.
Dallas County, Appellee. } No. 4186.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Paul, Minnesota, on the third day of August, A. D. 1914, certifies that the record in the case above entitled, which is pending in this court upon appeal for review of the decree in favor of the appellee, is an action in equity brought by the appellant as a judgment creditor of appellee, to have a commissioner appointed to levy and collect the special tax on the taxable property of said appellee, authorized by the laws of the State of Missouri, the officers of said county refusing to discharge their duties in that respect, although repeatedly commanded to do so by writs of *mandamus* issued by the court in which the judgment was rendered, and served at different times upon the proper officers of said county. The plaintiff, who is appellant herein, in his complaint alleges that he is a citizen of the State of Pennsylvania and the defendant, Dallas County, is a municipal corporation of the State of Missouri; that he is the owner of record of a certain final judgment against the defendant for over

a million dollars, recovered on the law side of the court in which this bill was filed on October 7, 1908, with interest thereon from that date. That said judgment was based upon judgments theretofore rendered by said court; that the original judgments were founded upon bonds issued by the county in the year 1871 under an Act of the General Assembly of the State of Missouri entitled "An Act to incorporate the Laclede & Fort Scott Railroad," approved January 11, 1860. This act, so far as it is necessary for the determination of the questions certified herein, is as follows:

"It shall be lawful for the County Court of any county in the State to subscribe to the stock of said company or invest its three per cent bonds or any other improvement fund belonging to the county as stock in said road; and for the stock subscribed in behalf of the county may issue the bond of the county to raise funds to pay for the same and to take proper steps to protect the interests of the county; may appoint an agent to represent the county, vote for and receive dividends; any incorporated city, town or company may subscribe to the stock in said railroad company and appoint an agent to represent its interests, give its votes and receive dividends and may take proper steps to guard and protect the interests of said city, town or company."

That under the laws of the State of Missouri in force at the time of the issuance of these bonds, which were

for the sum of $235,000, it was made the duty of the proper county officers to levy and collect annually a tax equal to thirty per centum of the amount of bonds issued; that this duty to levy and collect that tax or any part of it has never been performed by the county officers, and that there is no money in the county treasury which can be applied to the payment of this judgment or any part thereof; that the property of said county is exempt from seizure and sale under execution; that none of these bonds or any part of the interest thereon has ever been paid, and that the judgment of the plaintiff was duly recovered on said bonds and the interest coupons attached thereto, the defense of the county that such bonds were illegally issued having been overruled by the Court. That ever since the recovery of this and the former judgments against the county efforts have been made by the owners of said judgments to compel the levy of a tax to pay them; that writs of *mandamus* have been repeatedly issued by the Court commanding the officers of Dallas County, Missouri, to levy a tax to pay said judgments; that the marshals of the United States have been unable, except at times, and then only after long and vexatious delays, to secure service of process on said officers, during which time the said officers would and did secrete themselves and evade the marshals of the United States Court in their efforts to serve the said *mandamus;* that said writs of *mandamus* have in no case been obeyed

nor good cause shown for disobedience thereto; on the contrary, they have been treated with open and flagrant contempt; the official power of the United States has been defied. That when attachments have been issued for contempt for the failure of said officers to obey said writs, they would and did secrete themselves, abscond from the county and State, and when finally apprehended obtain their release by promises to secure a compromise of the litigation, and upon their failure to perform their promise would evade recapture until their successors in office were installed, when the whole farcical proceedings would be compelled to be re-begun against their successors in office with like fruitless and farcical results. That the plaintiff has within late years instituted a number of proceedings against all of the agents of said Dallas County without effective results. That on November 29, 1911, at plaintiff's expense, a writ of *mandamus* was issued to compel the then officers and agents of defendant to levy a special tax for the sum of $70,500, being thirty per cent of the amount of bonds issued; that the county and its officers were duly served with process therein, and that on May 1, 1912, after a full hearing of counsel, a peremptory writ of *mandamus* was ordered, commanding the officers of said defendant to levy and collect a special tax for the sum of $70,500 upon the taxable property of said county for the purpose of paying the same on said judgments; that when said officers met for the pur-

pose of levying said taxes they refused to obey the said peremptory wit of *mandamus* and failed to levy such tax; that writs of attachment were thereafter issued for the two justices of said County Court, who constituted a majority thereof, and who had refused to obey said writ, and although the marshals of this court made repeated efforts and spent many days searching for them, they have been unable to apprehend them by reason of the fact that they concealed themselves or absconded from the county and State; that meanwhile the terms of said officers so in contempt have expired; that an *alias* peremptoy writ of *mandamus* was issued at the expense of this plaintiff on April 9, 1913, but owing to the fact that said officers and agents concealed themselves, the said writ remains unserved, although through no fault of the plaintiff; that to sue out additional writs of *mandamus* each year would be expensive and would require a multiplicity of suits, delays and with the result that they would be disobeyed as they have in the past. That the officers of the county charged by law with the duty of the levy and collection of taxes are:

(*a*) Three Justices of the Peace;

(*b*) The County Clerk, whose duty it is to extend them on the tax books;

(*c*) The Collector, whose duty it is to collect them;

(*d*) The County Treasurer, whose duty it is to re-

ceive taxes when collected and disburse them to the proper officers;

that all the acts required to be done to collect the $70,500 to which the plaintiff is now entitled under his judgments and writs of *mandamus* are clerical and ministerial and no act of discretion whatever is required to accomplish this purpose. Sections 30 and 31, page 427 of the Revised Statutes of Missouri of 1857, which were in force when the bonds were issued, and which became a part of the contract between the parties, provided that the County Court should levy to pay such bonds a special tax not exceeding thirty per cent in any one year of the $235,000, which is $70,500; that it should hold and apply this tax to the payment of such bonds and to no other purpose, and that the last previous assessment should constitute the basis of the assessment or levy. The last previous assessment has been made and recorded, and the only acts requisite to collect the $70,500 are the mere clerical or ministerial acts of apportioning it among the taxables in the county on the basis of that assessment and collecting it of the parties and properties liable.

It is therefore prayed that the Court, sitting as a court of equity, appoint a commissioner for the purpose of levying and collecting and paying over the taxes as prescribed by the laws of the State of Missouri.

The defendant filed a motion to dismiss the bill upon the grounds:

1. The facts alleged are insufficient to state a valid case in equity.

2. Plaintiff has a plain, adequate and complete remedy at law.

3. This court possesses no power or authority to levy or collect taxes for the satisfaction of the judgment mentioned in plaintiff's bill; neither has it authority to appoint or designate any other person for that purpose.

4. The granting of the relief prayed for by plaintiff would be an invasion of the constitutional and sovereign rights of the State of Missouri and its citizens.

5. To levy and collect the tax prayed for in plaintiff's bill would tend to deprive the State of Missouri of the right it possesses as a sovereign State secured to it by the Federal Constitution and would destroy the republican form of government guaranteed to it by that instrument.

The motion to dismiss was sustained by the trial court, and from that decree this appeal was taken.

And the United States Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to it in the cause above entitled; that the decision of these questions is indispensable to the determination of this cause, and to the end that the cause may be properly determined and disposed of, it desires the instruction of the Supreme

Court of the United States upon the following questions:

1. Has a District Court of the United States, sitting as a court of equity, jurisdiction of such a cause?

2. When a judgment has been recovered on the law side of a District Court of the United States of competent jurisdiction against a county of the State of Missouri on its bonds issued by authority of law and the laws of that State in force at the time the bonds were issued authorized such county to levy and collect taxes to pay such bonds and the county has no funds in its treasury which can be applied to the payment of the judgment and its property is, under the laws of the State, exempt from seizure and sale under execution, when the officers charged by the laws of the State with the duty to levy and collect taxes to pay such judgment refuse so to do, when the court in which such judgment was rendered has a number of times issued writs of *mandamus* commanding such officials "to levy" the taxes which they were authorized and which it was their duty to levy to pay such judgment, but these officials have, when possible, evaded service of these writs, and when served have willfully and defiantly refused to obey the writs of *mandamus*, and the fact has been conclusively demonstrated by the proceedings at law that the plaintiff is utterly remediless at law by *mandamus* or otherwise for the failure of the county to pay and the refusal of the officers of the county to discharge

their duty to levy and collect taxes and therewith to pay his judgment; and when the last previous assessment was made which, by the statute in force at the time the contract was made, was authorized and made the basis of the levy of the amount to which the plaintiff is now entitled under his judgment and writs of *mandamus* so that no act of discretion is required to levy and collect it, but only the clerical or ministerial acts of apportioning the amount among the assessed values of the taxables specified in the last previous assessment, placing it on the tax books and collecting it of the persons and property liable therefor, has the Federal Court of the District in which the judgment was rendered and the futile writs of *mandamus* issued and, when possible, served the jurisdiction and authority in equity to appoint a commissioner, receiver or other officer to make the apportionment and to collect the amounts which the owner of the judgment is entitled to have collected from the parties and properties liable therefor?

WALTER H. SANBORN,
U. S. Circuit Judge.
WALTER I. SMITH,
U. S. Circuit Judge.
JACOB TRIEBER,
U. S. District Judge.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of David Yost, appellant, vs. Dallas County, No. 4186, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri, this third day of August, A. D. 1914.

(Seal) JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID YOST, Petitioner,

vs.

DALLAS COUNTY, Respondent.

No. 604.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1914, of said court, before the Honorable Walter H. Sanborn and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest: (Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal of United States Circuit Court of Appeals, Eighth Circuit.)

Be It Remembered, That heretofore, to-wit, on the thirtieth day of March, A. D. 1914, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein David Yost is appellant and Dallas County is appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Waiver of Issuance and Service of Citation.)

In the United States District Court for the Southern Division of the Western District of Missouri.

David Yost, Plaintiff,
No. 3. vs. In Equity.
Dallas County Defendant.

Waiver of Citation.

Whereas an appeal has been granted the plaintiff herein from a decree rendered against him by the above Court in this cause at the October Term of said Court (on Feby. 1914) to the United States Circuit Court of Appeals for the 8th Circuit.

Now, therefore, the issuance and service of a citation herein is hereby waived and the defendant enters its appearance at the May term of said United States Circuit Court of Appeals to be begun on May 4th 1914 at the city of St. Paul, Minn.

J. W. MILLER,
Buffalo, Mo.,

JOHN S. HAYMES,
Buffalo, Mo.,
Solicitors of Record for Defendant, Dallas County.

Endorsed: Filed in the Circuit Court of Appeals on March 30, 1914.

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2 (Bill of Complaint, filed Sept. 15, 1913.)

3 In the United States District Court for the Southern Division of the Western District of Missouri.

David Yost, Plaintiff,
vs. In Equity.
Dallas County, Missouri, Defendant.

To the Honorable Judges of the United States District Court for the Southern Division of the Western District of Missouri: Plaintiff says:

1. That he is a citizen and resident of the County of Allegheny, State of Pennsylvania; that the defendant Dallas

County, Missouri is a municipal corporation of the State of Missouri situate within the Southern Division of the Western District of Missouri.

4 2. That the plaintiff is the owner of record of a certain final judgment rendered on the 7th day of October 1908 in the United States Circuit Court for the Southern Division of the Western District of Missouri, in a certain cause wherein John B. Henderson, Jr. was plaintiff and Dallas County, Missouri was defendant, for the sum of $1,023,102.17 together with interest from said date of judgment on $241,491.84 at the rate of 10 per cent per annum, on $398,605.37 at the rate of 7 per cent per annum, and on $383,004.96 at the rate of 6 per cent per annum, and costs.

3. That said judgment was based upon judgments theretofore rendered in said Court; that the original foundation of said judgments was certain bonds issued during the year 1871 by said Dallas County, Missouri, which bonds were issued under the laws of the State of Missouri applicable thereto, and particularly under an act of the General Assembly of the State of Missouri of January 11, 1860 entitled "An Act to Incorporate the Laclede & Fort Scott Railroad", which Act is hereinafter fully set out as Exhibit "A," attached hereto, and made a part of this petition.

4. That the total issue of bonds in aid of the Laclede & Ft. Scott Railroad Company and the total amount of the subscription made by said County under the law aforesaid, was $235,000; that said judgment remains wholly due and unpaid.

5. The plaintiff is informed and believes that there are other valid and existing unpaid judgments heretofore rendered in the United States Courts for this district against Dallas County, Missouri, as follows: Judgment rendered in case of Frederick W. Huidekoper vs. Dallas County for the sum of $255,805.65 on April 8th, 1908 with interest and costs;
5 judgment rendered in case of Arthur C. Huidekoper against Dallas County, rendered on April 8th, 1908 for $168,610.69 with interest and costs; judgment in case of Louis Krughoff against Dallas County, rendered on October 4th, 1905, for $24,647.31 with interest and costs; judgment in case of Henry D. Sexton against Dallas County, rendered on April 6th, 1909 for $80,996.29 with interest and costs.

6. That in addition to the judgments heretofore enumerated, there is now pending in this Court scire facias to revive a certain judgment rendered on October 15th, 1896 nunc pro tunc as of on the 9th day of October 1895 in favor of Lydia S. Hinchman against Dallas County, Missouri, for $32,883.15

with interest and costs, wherein, as plaintiff is informed and believes, the defendant Dallas County, Missouri, claims as a defense to said scire facias proceedings, that said judgment has expired by limitation; that said alleged defense has not yet been determined and that plaintiff has not sufficient knowledge or information to set out whether or not such defense is meritorious or not, or whether such judgment is a valid existing obligation or not.

7. That plaintiff is informed and believes that all of said judgments enumerated in paragraphs 5 and 6 are unpaid; the plaintiff is informed and believes that all of said judgments were based upon bonds issued under the Act of January 11th, 1860 of the General Assembly of Missouri, and that all of the judgments mentioned in paragraph 5 and the judgment mentioned in paragraph 6, if said judgment mentioned in paragraph 6 be still a valid judgment, have a common interest with the plaintiff, in equity, to the trust funds to be raised by
6 the special levy of taxes as hereinafter set out for the payment of said judgments, and this suit is brought by the plaintiff for the common benefit of the plaintiff and all of said judgment creditors as may elect to join in this proceeding, enter their appearance herein, bear their equitable proportion of the costs and expense of this proceeding, and submit to the equity jurisdiction of this Court in this suit.

8. Plaintiff is informed and believes that there are no unpaid valid and existing judgments against Dallas County, Missouri, based upon the said bonds, or entitled to participate in the trust fund, as hereinafter set out, except the judgment of this plaintiff and those set out in paragraphs 5 and 6; that all of said judgments so entitled to participate in said trust fund, were rendered in the United States Courts for this district; that this Court has jurisdiction over the trust fund hereinafter set out, and of the enforcement of said judgments, irrespective of the citizenship of the present owners of said judgment, although plaintiff is informed and believes that all of the owners of said judgments are citizens of states other than the State of Missouri, and that this Court has jurisdiction of this cause for that reason also.

9. Plaintiff brings this bill in equity to avoid a multiplicity of suits; to secure a ratable distribution of a common fund; to enforce a trust and declare the uses therein under the ancient and present jurisdiction of a court of equity, and to enforce the performance of legal duties cast upon defendant, and for the enforcement of the judgments of this Court because the ordinary remedies of the law have proven wholly ineffective, as will hereinafter fully appear.

10. That upon all of said judgments, demands have been repeatedly made for payment upon the defendant Dallas
7 County, Missouri, and payment refused; that upon all of of said judgments, either upon the original or the revived judgment, executions have been issued and returned "nulla bona"; plaintiff is informed and believes that there are now no funds in the treasury of Dallas County, Missouri, which may lawfully be applied to the payment of said judgments.

11. That under the law in force at the time of the issuance of said bonds, the levy of a special tax for Railroad purposes for payment of said bonds, was limited in any one year to thirty percent of the amount of the subscription of said County in aid of said railroad, and that the subscription of said County to said railroad was equal to the amount of said bonds, to-wit, $235,000.00.

12. That the duty of levying a special tax for railroad purposes in each year to the amount of thirty per cent of the amount of the subscription and issue of said bonds for every year, when necessary to pay said bonds, and the duty of collecting said tax and of paying the bond judgment creditors aforesaid was laid and enjoined upon the agents of Dallas County, Missouri, by the legislature of the State of Missouri, by the laws then, and constantly since, in force.

13. That said duty has never been performed by the agents of Dallas County, Missouri, and that said agents, as hereinafter fully appears, failed and refused to perform said duty under the laws of the State of Missouri, and defiantly refuse to perform said duties although repeatedly commanded to so perform by this Court.

14. That by the passage of the Act of January 11, 1860, and the issuance of the bonds by the agents of the County as
8 aforesaid, a contract was made that a special fund should be created for the payment of said bonds by the levy and collection of an annual tax, when necessary, to the full limit of thirty per cent of the amount of said bonds and subscription upon the taxable wealth in Dallas County, Missouri, made taxable by law for State and County purposes, and a trust was thereby created for the benefit of the holders of said bonds, to the use of which, when said funds should arise, all of the holders of said bonds might, and all of said bond-judgment creditors might, ratably resort, in equity, for payment. That the principal of said bonds, (sample copy of the

form of which bonds is hereto attached, marked Exhibit "B" and made a part of this petition), matured at various dates during the years 1886, 1887 and 1891.

15. That shortly after the issuance of said bonds, the said defendant Dallas County, Missouri, made default in the payment of the coupons for interest on said bonds; that said bonds and the coupons for interest thereon, in additon to the special lien of said bonds upon the trust fund which might and should have been raised by a special levy for railroad purposes as aforesaid, were a general obligation of the County of Dallas, Missouri, and subject to payment out of any surplus that might arise after the payment of necessary sums for the economical administration of County affairs upon a maximum lawful levy of taxes for county purposes; and that shortly after the default in payment of the coupons for interest, suits were brought by the holders of said coupons against Dallas County, Missouri, both in the State and United States Courts, and in all of which suits the defendant Dallas County, Missouri set up every defense that might have been set up against said bonds, and that said defenses were all judicially
9 determined against Dallas County, Missouri, and the following issues conclusively and finally determined and adjudicated:

(a) That said bonds, aggregating $235,000.00 were lawfully issued in payment of the lawful subscription of the County of Dallas, Missouri, in the aid of the Laclede & Fort Scott Railroad.

(b) That all facts necessary to be found by the agents of Dallas County, Missouri, as a condition precedent to the issuance by said agents of said bonds, are presumed to have been found.

(c) That said bonds were the lawful and binding obligation of Dallas County, Missouri, in the hands of the then holders thereof, and payable out of any funds that might arise from a lawful levy of taxes.

16. That in said suits for interest represented by coupons, and in the subsequent suits for principal of said bonds, which were brought after the maturity of the principal of said bonds, and upon every proceeding by scire facias to revive the judgments for principal and interest of said bonds, and in the many mandamus proceedings to compel the levy of taxes to pay said judgments, the said defendant Dallas County, Missouri, raised in each case the issue that said bonds were not lawfully issued, that the County Court in issuing said bonds was not acting in

an official capacity, that the amount of bonds so issued exceeded the amount authorized by the Legislature to be issued, that said bonds were issued without authority; and plaintiff says that all of said issues as to all of said bonds have been finally and conclusively adjudicated against said defendant Dallas County, Missouri, and that the defendant Dallas
10 County Missouri, is now estopped from further setting up any allegation of invalidity of the subscription and issue of said bonds. That the validity of the issuance of all of the bonds represented by the judgments before enumerated as to all matters of fact which were, or might have been, raised in defense, is now res judicata; and that as to all matters of law which were raised, or might have been raised against the validity of said bonds, or in denial of the obligation and duty of the county to pay the same and to lawfully levy a tax for that purpose, have been finally passed upon by the Courts of the United States in judgments affecting the defendant and these bond-judgment creditors, and in this class of cases; that the judgments herein referred to have been transferred of record from time to time to purchasers who relied upon the doctrine declared by said Courts and that the law declared upon all of this class of cases affecting the issuance of these Dallas County bonds, has now become by this long line of cases a rule of property, and that the doctrine of stare decisis should now be invoked, and the defendant no longer permitted to be heard with frivolous defenses so, for many years, adversely decided against it.

17. Plaintiff further states that since 1886, when the principal of some of the bonds matured, there have been repeated efforts by the holders of said judgments, to compel the levy of a tax to pay said bonds and to compel the levy of a tax to pay the judgments rendered on said bonds, that writs of mandamus have been repeatedly issued by the United States Court, commanding the agents of Dallas County, Missouri, to levy taxes to pay said judgments, that the marshals of the United States Court have been unable except after long and vexatious
11 delays, to secure service of notices of applications for the writs of mandamus, and only after months of delay, during which the agents of Dallas County would, and did, secrete themselves and evade the marshals of the United States Court, have said marshals been able to serve alternative writs of mandamus; that said alternative writs of mandamus have, in no case been obeyed, and in no case has good cause been shown for disobedience thereto, but the returns of such defendant have in every case been adjudged insufficient; that peremptory writs of mandamus have then been issued, and that these

peremptory writs of mandamus also could only be served after long delay, which delays were caused by the obstruction of justice by defendant, meanwhile in many cases the terms of office of the agents of Dallas County, Missouri, would and did expire; that when the terms of office of the agents of Dallas County, Missouri, had not meanwhile expired, and when finally said peremptory writs of mandamus have at great labor and expense, been served upon the agents of Dallas County, Missouri then in office, said writs have been treated with open and flagrant contempt; that the judicial power of the United States has been openly defiled; that when final attachments have been issued for contempt, for the failure of said agents of defendant to obey said peremptory writs, the offending agents of said County would and did secrete themselves, abscond from the county and the State, and when finally apprehended, as, in some cases, they were, would, and did upon the pretext and promise of securing a compromise of the litigation, by inducing the isue by Dallas County of refunding bonds in compromise of the debt, secure their temporary release from custody, and said agents then failed to perform their promises, and
12 would and did evade recapture until their successors in office were installed, when the whole farcical proceeding would be compelled to be begun anew against their successors in office, with like fruitless and farcical results.

18. This plaintiff has within late years inaugurated a number of proceedings against all of the agents and officers of Dallas County, charged by law with duties in the premises, with ineffective results, and particularly the following recent proceedings:

On the 29th day of Nov. 1911 at plaintiff's instance, a writ of mandamus was issued to compel the then officers and agents of Dallas County, Missouri, to levy a special tax for railroad purposes, of $70,500.00 upon the taxable property of Dallas County, Missouri, for the year 1912, that Dallas County, Missouri, was duly served therein, that all of the officers and agents of said county, charged with any duty therein, were duly notified and had full knowledge thereof, that upon the appearance of defendant, and after a full hearing and argument of counsel a peremptory writ was, on May 1st, 1912, ordered, that at said hearing it was conclusively determined and adjudicated that the special tax for railroad purposes in the sum of $70,500.00 so provided by the law as aforesaid, might, and should be levied upon the taxable property of Dallas County, Missouri, made taxable by law for State and County purposes, in each year, and that it was the duty of the officers and agents of said Dallas County, Missouri [illegible]

and to collect said tax, and such issue is conclusively and finally determined. That said tax was then ordered to be levied for the year 1912. That the agents of Dallas County, Missouri, charged with the duty of levying said tax, were the justices of the County Court, that said agents met at
13 the regular term of said County Court in May 1912, and, by a majority of said Court, refused to obey the peremptory writ of mandamus, and set the said mandate of this Court at defiance. That writs of attachment were thereafter issued for the two justices of said County Court constituting a majority thereof, who had refused to obey said writ, said justices being to-wit, George W. Wallace and John R. Hackler, that although the marshals of this Court have made repeated efforts to do so, and have spent many days searching for said justices, they have been unable to apprehend them and bring them before this Court for punishment, by reason of the fact that said justices have concealed themselves or absconded from the County or State. That meanwhile the terms of said justices so in contempt have expired. Plaintiff says that said offending justices and all other agents of Dallas County, to whom said mandate was addressed charged with any duty under said mandate (except Pitman, the minority member of the County Court) has by his action in attempted evasion of service of said writ, by failure to make return of willingness to perform his duty, and by his open expression of desire and of his intent to not perform his duty in the premises shown that said writ cannot be made effective to accomplish its purpose of collecting a tax for the payment of said judgment, if any step necessary to that end be left to the agents of Dallas County, Missouri; that any proceeding against the agents of said county by sequestration of the property of the agents of said county to attempt to compel obedience to this, or any other writ of mandamus for this purpose, would be unavailing, for the reason that none of said agents owns sufficient property above his homestead and exemptions to
14 make sequestration a matter of consequence to him, or effective to the benefit of the plaintiff where interests of this magnitude are involved, and that plaintiff believes from the experiences of many years, as shown herein, that the attachment of the agents of the county for contempt would not result in obedience to the mandates of this court in this regard.

19. That a peremptory writ of mandamus was issued, at the instance of this plaintiff on the 9th day of April, 1913, commanding the present officers and agents of Dallas County, Missouri, to levy and collect a special tax of $141,000.00 during the year 1913, being $70,500.00 so ordered to be levied for the year 1913 and in addition $70,500.00 being the levy for railroad mur-

poses for the year 1913, that said writ of mandamus directed the justices of the County Court to levy same at the May term of the County Court this year (1913), and directed other agents to collect said tax, but owing to the fact that said officers and agents concealed themselves and absented themselves from their usual places of business and abode, for the purpose of evading service of said writ, the marshals were unable to serve personally the said officers and agents with said writs, and said writ remains, through no fault of plaintiff, unexecuted.

20. That as fully appears by the returns of the respective marshals to the numerous mandatory writs heretofore issued by this Court, the inhabitants of Dallas County, Missouri are in a general league and conspiracy to evade and defeat the processes of this court with relation to the enforcement of these judgments.

21. Plaintiff is informed and believes that each and every person upon becoming a candidate for any office in Dallas County charged by the laws of Missouri with any duty in relation to the levy or collection of the special tax for railroad purposes, or with any duty to perform any act towards the payment of said judgments, solemnly pledges himself to said conspirators to violate his oath of office, if elected, and to defy the jurisdiction of the United States Court in the premises, and to insofar as his power goes, nullify its judgments and decrees in the premises, and that upon, and by reason of said pledges said persons are elected to office; that sentinels are maintained throughout the county to warn the agents of the county of the approach of the United States marshals, and that the county is practically in rebellion, has seceded from the Union, and has set up a rule of action by the conspirators in defiance of that prescribed by the United States.

22. Plaintiff says that the duty of levying and collecting such special tax for railroad purposes is purely ministerial; that the Legislative body of the State of Missouri has impressed such duties upon the occupants of certain offices of the County, as hereinafter detailed, but that the method of performance is so plain under the law that such performance becomes merely ministerial; that such duties, in the respective steps necessary to be taken to finally accomplish the raising of the trust funds and the payment thereof to the creditors, are so many that any one of the occupants of such offices by refusing to perform the duty enjoined by law and by simply choosing to be in contempt of this Court by refusing to perform any duty enjoined upon

vision be made by this Court for the performance of such ministerial duties by some person other than the then officer of the County who may refuse to perform.

16 23. Plaintiff states that said special annual tax of $70,500.00 for railroad purposes, is, by the laws of the State of Missouri, made taxable, upon such taxable property of Dallas County as is made taxable by law for state and county purposes. That assessments have been made of the taxable property for state and county purposes in Dallas County, Missouri, for every year. That the duty enjoined by law of levying said taxes is a duty enjoined upon the justices of the County Court of said Dallas County, Missouri. That said County Court of said Dallas County, Missouri, is not in any manner, nor in any particular with respect to the duty of levying this tax, a judicial assembly, nor is it clothed by the laws of Missouri with any judicial or other discretion with relation to the levying of this tax, but is required by the laws of Missouri simply to enter upon its record a memorial of the levy of the tax, and to ascertain, by calculation, the rate to be levied to raise said sum; that it is palpable that the full limit of thirty per cent of the bonds issued, or $70,500.00 in any one year should be levied as a railroad tax, and that no discretion now exists as to levying a smaller sum, that no power exists to levy a larger sum for any one year, as a special railroad tax, except in succeeding years to levy for years that may have been omitted; and that it is palpable that such maximum levy of $70,500.00 each year should, in the performance of the duty enjoined by law, be continued annually for the purpose of being applied to these judgments until the debt of said County represented by said judgments shall, by the action of the inhabitants and the consent of the bond-judgment creditors be refunded and compromised.

24. Plaintiff further states that to compel this plain-
17 tiff and others similarly situated to sue out ineffective writs of mandamus each year, and to confine their remedy, when the writ of mandamus is disobeyed, to an expensive chase for the apprehension of the offending agents of Dallas County who are in contempt of this court, is practically a denial of justice, and would require a multiplicity of suits, endless delays and enormous costs without practical results, which may, and in equity should be, avoided, and which it is the special province of equity courts to avoid; and as the plaintiff shows the court herein, the County of Dallas has been repeatedly made party to writs of mandamus, that its officers are continually changing, that it is apparent that the agents of Dallas County now in office do not intend to obey the writs of

mandamus heretofore issued, the interposition of the Court of equity to effectuate, preserve and maintain the dignity and jurisdiction of this Court to collect and administer the trust fund created by the laws of Missouri for the benefit of these judgment creditors, is therefore sought.

25. Plaintiff says that the particular agents of Dallas County charged by law with the duty of the levy and collection of the aforesaid special tax for railroad purposes, and with the performance of the duty imposed by law of devoting the proceeds arising therefrom as and towards a fund for the payment of said judgments in the ministerial duties, respectively to be performed, are (a) three justices of the County Court charged with the duty of levying the taxes, that is of ordering the levy for such purposes to be made, and, by arithmetical calculation, determining the rate necessary to be laid against each dollar of taxable wealth already made taxable by law for state and county purposes, to raise the sum
18 necessary to be annually raised; (b) the County clerk whose duty it is to enter a memorial of the levy and the rate, and to extend the tax against each owner of said taxable wealth upon the regular tax book, or upon a special tax book for said purpose, and to certify the same and deliver the same to the Collector of Revenue of said County; (c) the Collector of the Revenue, whose duty it is to collect said sums so laid as taxes, to receipt the tax payer therefor, and to deliver the moneys so received to the Treasurer of the County as a separate fund; (d) the Treasurer of the County, whose duty it is to receive such moneys as may be delivered to him by the collector, safely keep same in separate fund for the use of these judgment creditors who are entitled thereto, and to disburse the same to said persons upon lawful authority.

26. That all of said acts are purely ministerial, and involve the exercise of no discretion whatever, that the exercise of no one of said duties with relation to the levying and collecting of said taxes, and the administration of said trust fund, can in any manner affect their respective duties to, in other matters, administer the affairs of the county; and that the performance of such duties with relation to this special tax and trust fund by any person other than the officers especially charged with the performance of said duty, in the event such officer has failed or fails or refuses to perform said duty, can in no wise affect the performance by such officer of other fiscal duties which he may have in the administration of the affairs of the said municipality; neither can the performance of any or all of said duties with relation to said special tax and trust fund by a substitute to be designated by this court interfere in any manner with the powers of the State of Missouri.

27. That it is apparent that until and unless the amounts now due the judgment creditors be reduced by a scaling of the debt in an issue of refunding bonds, under a compromise between the defendant Dallas County, Missouri, and the judgment creditors, the full maximum levy of $70,500.00 should be made in each year for railroad purposes; that the duty to levy and collect such tax each year is positive; that the defendant is required to take notice of such duty; and that the plaintiff should not be required to sue out a separate writ of mandamus each year, but that said duty should be enjoined upon the present occupants of the offices of Dallas County, Missouri, and their successors, and upon the failure to perform any or all of the duties in each year, and without further notice to defendant, the plaintiff should at once be entitled to the action of substitutes to perform the duty of executing the trust, and to receive the benefits of the orders hereinafter prayed for.

28. Plaintiff shows the Court that the original debt has been greatly augmented by the accrument of interest, that the increase in this debt is not due to any fault of this plaintiff or to the fault of any of the other judgment creditors, but is due wholly and entirely to the neglect of the duty of the defendant Dallas County, Missouri, by its agents and inhabitants; that the County has been and still is in a state of outlawry, setting at defiance the powers of government of the United States, and disregarding the duties enjoined upon it and them by the Legislature of the State of Missouri; that it is only under great difficulties and at great personal risk that any process of the Federal Court with relation to these judgments, may be executed in the County, and that the judgment creditors have been as vigilant in enforcing their rights and in attempting to compel the defendant to discharge its obligations as such obligations arise, as could be, in law or equity, required of them under these conditions.

29. That said debt is now swollen to such a sum that the annual payment of $70,500.00 is not sufficient to pay the interest which annually accrues upon said judgments; that unless said debt be compromised, even though the full sum of $70,500.00 be annually collected and devoted to that purpose, the said debt can never be paid unless the same shall be paid out of an unexpected increase in the general revenue arising from an almost impossible increase in the values of the taxable wealth of the County—a contingency not likely to arise in a county so hopelessly in debt; and the plaintiff, being entitled to share ratably in the trust fund before mentioned, in equity, and being entitled in law to priority by reason of his particular vigilance

and activity with regard to the tax for the year 1912 and year 1913, offers now and at all times hereafter to submit to the mediation and award of this court as a court of equity with regard to such sums and all other sums that may arise, and asks that all other judgment creditors, as a condition of sharing the trust fund as aforesaid that may arise annually from the levy of the annual tax of $70,500.00, be now required to submit to the mediation and the award of this Court upon any compromise of the debt which may be recommended by this Court, acquiesced in by the defendant Dallas County, and performed by the defendant Dallas County, by the issuance of refunding bonds in compliance with the award of the court and the laws of Missouri governing refunding bonds.

21 Plaintiff says that this offer is made in the effort to do equity, to avoid oppression, to restore peace in Dallas County, to induce the development of the County, and in the hope that the obligation to pay such refunding bonds as may be issued in payment to this plaintiff and other judgment creditors, under any compromise that may be effected, may be generally recognized by the officers, agents, tax-payers and inhabitants of said County as a moral and legal obligation to be performed, rather than, as now, a legal obligation to be disregarded.

Plaintiff says that the judgments rendered in favor of A. C. Huidekoper and F. W. Huidekoper, mentioned in paragraph 5, have been transferred of record to and are now owned by, Alexander Dempster, a citizen and resident of the City of Pittsburgh, County of Allegheny, State of Pennsylvania, and whose post office address is 213 Sixth Avenue, Pittsburgh, Pennsylvania; that the address of Louis Krughoff mentioned in the same paragraph as another judgment creditor is unknown to plaintiff, but that his attorney of record is Thos. K. Skinker, whose post office address is St. Louis, Mo.; that the post office address of Henry D. Sexton, mentioned in same paragraph, as another judgment creditor, is East St. Louis, Illinois; that the post office address of Lydia S. Hinchman is Philadelphia, Pennsylvania, and that her attorney of record is——Farrington, whose post office address is Springfield, Missouri.

This plaintiff offers to do whatever equity requires in the premises, and forasmuch as the plaintiff can have no adequate relief except in this court, the plaintiff prays as follows:

1. That the judgment creditors before enumerated, to-

22 wit: Alexander Dempster, Louis Krughoff, Henry D. Sexton, and Lydia S. Hinchman be required by order of this Court, to within twenty days after notice of this suit, enter their appearance herein as co-plaintiffs, intervene, or sub-

mit to any action which, in equity, may follow their failure or refusal to join herein; that this Court order that the said judgment creditors before mentioned shall be notified of this suit, either by delivery of a copy of this petition together with a copy of the order herein made by the Court, to each of said judgment creditors in person, or to his or her attorney of record respectively, or by depositing in the United States mail, postage prepaid, a copy of said petition and the order of the Court herein, addressed to each of said judgment creditors, or to his respective attorney of record.

2. That a subpoena may issue out of this Honorable Court, directed to said defendant Dallas County, Missouri, requiring and commanding it to appear in this cause upon a day certain and answer the several allegations in this petition contained, an answer under oath being hereby expressly waived, and to submit to, abide by and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and conscience.

3. That said subpoena be, by the Court ordered to be served by the marshal upon the defendant Dallas County by delivering a copy of this petition and a copy of the subpoena to the clerk of the County Court of Dallas County, Missouri, but that inasmuch, as is fully shown by the proceedings, original and ancillary, in the premises, the Clerk of the County Court of Dallas County, Mo., has heretofore done his utmost to evade service of all writs of this Court and will continue to evade
23 service, that this Court order that in the event the marshal of this Court shall not be able with reasonable diligence to deliver said subpoena and copy of this petition to the said Clerk of the County Court, then that a copy of said subpoena and petition be posted upon the door of the office of said Clerk of the County Court of Dallas County, Missouri; that a copy of said subpoena and petition addressed to the Clerk of the County Court of Dallas County at Buffalo, Missouri, (being the County Seat of said County) be deposited in the United States mail, postage prepaid, and that another copy of said petition and subpoena addressed to the Prosecuting Attorney of Dallas County, Missouri, at Buffalo, Mo. be deposited in the United States mail, postage prepaid, and that the Court order that forasmuch as the defendant Dallas County, Missouri, has heretofore appeared in the causes wherein this proceeding is in equity supplementary, and is required to take notice of all proper proceedings for the enforcement of judgments of which it is conclusively bound, that said substituted service be found and ordered by the Court to be sufficient.

4. That, whereas, the agents of the defendant Dallas County, Missouri, now in office may hereafter allege lack of knowledge of the proceeding in this Court and of the orders herein made, this Honorable Court order that a printed copy of this petition be deposited in the United States post office, postage prepaid, by the attorney for the plaintiff, addressed to each of the following persons now occupying the following respective offices in said County at Buffalo, Missouri, the county seat of said county;

Wm. L. Pitman, Presiding justice of the County Court,

24 F. M. Gaunt, Justice of the County Court,

Walter E. Day, Justice of the County Court

S. E. Gann, Assessor of Dallas County, Missouri,

James A. Bonner, Collector of the Revenue Dallas County, Missouri,

John I. Maddux, Clerk of the County Court of Dallas County, Missouri,

J. W. Owensby, Treasurer of Dallas County, Mo.

and that hereafter whenever a successor to any of said persons in any of said offices shall qualify to said office, that a printed copy of said petition be then mailed by the attorney for the plaintiff to said successor in the same manner; and in order that the tax payers and inhabitants of Dallas County, Missouri may have full knowledge of the proceedings herein that a printed copy of this petition be posted by the marshal of this Court upon the door of the Court House in the town of Buffalo, County of Dallas, Missouri, being the proper meeting place for the County Court of Dallas County, Missouri, and that one printed copy of this petition be posted in each of four other public places in said County.

5. That inasmuch as the mandatory order for the specific performance of the levy of the tax for railroad purposes for the year 1912 in the sum of $70,500.00 upon the taxables of Dallas County, Missouri, made taxable by law for State and County purposes, has not been complied with, and inasmuch as the agents of the defendant have expressly refused to comply therewith, and are now in contempt of this court, plaintiff prays that the act and acts required to be done by said mandatory order, be by order now to be made by this court, done by some other person to be appointed by this court, that said act and

25 acts relating to the levy and collection of said special tax for railroad purposes be performed as nearly as prac-

ticable in the same manner as should have been performed by the agents of Dallas County, and to this end that the last assessment of taxables for State and County purposes be now used if obtainable for said purpose, that upon the levy, and extension of the tax by the person so to be appointed by the Court, such supplementary proceedings may hereafter be ordered as to the Court may seem proper in the collection of said tax against any person refusing to pay said tax, and that this Court retain jurisdiction of this cause for this and all other purposes in the enforcement of said judgments before enumerated and for the distribution of this trust fund.

6. That the present agents of Dallas County who are occupants of the respective offices of Dallas County, Missouri, charged with the duty of levying and collecting the special tax of $70,000.00 for the year 1913, to-wit:

The Presiding justice and two associate justices of the County Court, the Clerk of the County Court, the Collector of the Revenue and the Treasurer be required by order of this Court to personally appear and submit to the jurisdiction of this Court, and declare their intention to faithfully perform their duties in the premises, as they may arise, that the justices of the County Court shall instanter, order the levy of taxes for the year 1913 and that each of the other agents charged with any duty under the law in the premises, shall perform immediately all necessary steps towards the immediate levy and collection of the tax for the year 1913, and that unless said acts be promptly performed and the per-
26 formance promptly certified to this Court that this court shall reserve jurisdiction for the purpose of making further orders in the premises as exigencies may arise.

7. That the defendant Dallas County, Missouri, its present officers and agents, and their successors as they may qualify, be enjoined and commanded to proceed in each year hereafter as soon as may be, and in no event later than the first week in May of each year to the levy and collection of a special tax for railroad purposes in each year upon the taxables of Dallas County, Missouri, made taxable by law for State and County purposes, for the purpose of payment of the judgments herein referred to and in the performance of the trust duty imposed by law.

8. That said funds when collected shall be ratably applied to the judgment creditors as this Court may find in equity thereto entitled, that a Master be appointed for the purpose of supervision and direction of the performance of this trust, and for the hearing of evidence, the adjustment of accounts, and

all other proper purposes herein, and that this Court retain jurisdiction of this cause for all purposes until said judgments be finally enforced and satisfied, and for such other and further equitable relief as to the Court may seem just and proper.

HARRY J. CANTWELL,
Plaintiff's Solicitor.

Thos. B. Crews,
Of Counsel.

State of Missouri,
City of St. Louis—ss.

DAVID YOST being duly sworn upon his oath says that he is the plaintiff in the foregoing petition and bill of com-
27 plaint, that he has read the foregoing bill, and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

DAVID YOST.

Subscribed and sworn to before me this 25th day of August, 1913. My commission expires Sept. 17th, 1916.

ROSE HEIMAN,
Notary Public.

(Seal) Rose Heiman, Notary Public, City of St. Louis, Mo.

Exhibit "A"

Session Acts 1859—60—pp. 434-439.

An Act to incorporate the Laclede and Fort Scott Railroad Company.

Be it enacted by the General Assembly of the State of Missouri as follows:

1. That a company is hereby incorporated to be called the Laclede and Fort Scott Railroad Company, the capital stock of which shall be six millions of dollars, to be divided into shares of one hundred dollars each, the holders whereof, their successors or assigns, shall constitute and be a body politic and corporate, in law and in fact, by the name and style aforesaid; and by that name shall have perpetual succession; may sue and be sued; plead and be impleaded; defend and be defended against; may make and use a common seal, and break and change the same, and shall be able in law and equity to make

contracts; may make, hold, use, possess and enjoy the fee
28 simple or other title in and to any real estate, and may sell and dispose of the same; may make by-laws, rules and regulations proper for carrying into effect the provisions of this act, not repugnant to the Constitution or laws of the United States or of this state, and shall have the usual and necessary powers of corporations for such purposes.

2. That Rufus S. Phillips and A. S. Cherry of the County of Laclede; J. N. Morrow and Dr. E. Hovey of the County of Dallas; William M. Griggs and John T. Snyder of the County of Polk; Horace B. Lindsay and Henry Cravens of the County of Cedar; Dr. J. Dodson and James H. Blanton of the County of Vernon; George E. Ward of the County of Barton; and George A. Crawford of Kansas Territory, or any seven of them, shall constitute the first Board of Directors under this act, and shall hold their offices until their successors are elected and qualified. They shall meet at such time and place as may be designated by any three of them above named and organize themselves into a Board of Directors, and when organized shall cause books to be opened for the subscription of capital stock of said company, and at such times and places as they may designate, under the supervision of such persons as they may appoint, and continue them open so long as they may deem proper, and may reopen such books when deemed necessary, until the whole stock shall have been subscribed.

3. So soon as ten shares shall have been subscribed, the Directors shall cause an election to be held, for the election of seven directors, at such time and place as they may designate, giving four weeks notice in some newspaper published in a county through which the route of the contemplated road will be located.

29 4. An election of seven Directors shall be held on the third Monday in June of each year, and if not held on that day, an election shall be held at any other time the directors may designate. The election shall be held under the supervision of one or more stockholders, and the person receiving the highest number of votes shall be elected, and shall continue in office until his successors are duly elected and qualified. Every stockholder shall be entitled to one vote for every share of stock held by him, and may vote by proxy. Within sixty days after their election the Directors shall meet and elect one of their number President, who shall hold his office for the term for which he was elected director, and until his successor shall be qualified.

5. The directors may appoint agents, clerks, engineers, superintendents, and other officers and servants for said company, and shall keep a journal of their proceedings, and shall cause correct books and accounts to be kept. They may determine by by-laws what number of Directors shall constitute a quorum, and may appoint committees, and fill vacancies in office under said company; they may fix the salary of the president and the officers, agents and directors, but no director shall receive compensation as such exceeding one dollar and fifty cents per day while the board is in session, and ten cents per mile for traveling from his place of abode to the place of meeting of the Board of Directors, and the same mileage for his return; they may take securities from the officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

30 6. The Directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper; and if any stockholder shall fail to pay any such requisition within ten days after the time appointed, the said company may recover the same with interest, and if not collected, may declare the stock forfeited and sell the same. No delinquent stockholder shall vote in said company.

7. Said company shall have full power to survey, mark, locate, construct, maintain and operate a railroad, commencing at some point in Laclede County, by the most direct and practicable route through the Counties of Laclede, Dallas, Polk, Cedar and Vernon, in the direction of Fort Scott in Kansas Territory, and for that purpose may hold a strip of land not exceeding a hundred feet in width, with as many tracks as the President and Directors may deem necessary: Provided, That in passing hills or valleys the said company are authorized to extend such width so far as may be necessary to effect such object; and may also hold sufficient land for the erection of depots, work houses, shops and water stations, and may select such route as may be deemed most advantageous, and may extend branch railroads to any point in any of the counties through which the said railroad may be located.

8. Said company may take voluntary relinquishments of the right of way for said railroad and the necessary depots, shops and stations, and if the lands through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of said minor shall have power to convey to

such company so much of the land as may be necessary
31 for the purposes aforesaid, on fair and equitable terms, but every such conveyance by guardian shall be subject to the approval or rejection of the county court in which such guardianship is pending.

9. If any owner of any tract of land through which said railroad shall pass shall refuse to relinquish the right of way for said road to said company, or the necessary lands for depots, engine or warehouses, water stations, or turnouts, or if the owners be infants or persons of unsound mind, or non-residents of the State, the facts of the case shall be specially stated to the Judge of the Circuit Court of the county in which such lands are situated, and such Judge shall thereupon appoint three disinterested citizens of said county to view such lands, who shall take into consideration the value of the land and advantages and disadvantages of the road to the same, and shall report, under oath, what damages will be done the said lands, or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned. Notice of such application to such Judge shall be given to the owner of such lands five days before such application shall be made, if such owner reside in this state, or to his guardian; and if such owner be a non-resident of this State, he may be served with actual notice or by an advertisement for four weeks in some public newspaper.

10. The persons appointed to view and value such lands shall file their report and plat in the office of the clerk of the Circuit Court of the county in which the land or a greater part thereof is situated, and if no valid objection is made to said report, the court shall render verdict in favor of such
32 owner against said company for the amount of damages assessed, and shall make an order vesting in said company the fee simple title of the lands in such report and plat described. Objections to such report must be filed within ten days after the same is filed, which objections shall be examined by said Judge in term time or vacation, and he may hear testimony, and by judgment confirm said report; or he may set the same aside and appoint three other viewers, who shall proceed in the same manner and make their report, until a report is confirmed: Provided, in order that the progress of the work may not be impeded, that after said viewers have filed their report and plat in the office aforesaid, the company, after having made a tender of the amount of damages to the person or persons entitled to the same, make a deposit of the amount with the Clerk of the said Circuit Court, shall be authorized

to proceed in the construction of the work as fully as though no disagreement had arisen. In all such cases the court shall attach the costs of the proceedings according to equity, and the court shall have the power to make such orders and take such other steps as will permit the ends of justice between the owners of such lands and said company; and the said viewers shall be entitled to the same fees as are allowed to commissioners in partition under the statutes.

11. Said company may build said road along or across any State or county road, or street, or alley, or wall of any town or city, or over any stream or highway, but whenever said railroad shall cross any State or county road, or any street or alley, said company shall keep good and sufficient causeways or other adequate facilities for crossing the same, and said railroad shall not be constructed as to prevent the public
33 from using any street, road, or highway along or across which it may pass, and when said railroad shall be built across any navigable stream, said company shall erect a bridge sufficiently high, on which to cross, or shall construct a drawbridge, so that in no case shall the free navigation of such stream be obstructed. Whenever any person shall own land on both sides of said road, said company, when required so to do, shall make and keep in repair one good causeway or other adequate means of crossing the same.

12. Said company shall commence the construction of said road within ten years, and shall complete the same within fifteen years after its commencement, and said company shall have general power to use, manage, control and enjoy said road; shall determine the kind of carriages and engines that shall be used thereon, and by whom, and in what manner; and shall determine the terms, conditions, and manner in which merchandise, property, and passengers shall be transported thereon; and shall have power to fix the width of the track of said road between the rails as may enable them to make suitable connections with other railroads, any law to the contrary notwithstanding, and also shall have power to construct and keep such turnouts, gates, culverts, toll houses, depots, warehouses, causeways, and other buildinges, machinery and fixtures as may be necessary. Said company may receive such tolls and freights as may be determined upon by the Directors, and shall keep posted up at their depots estimates of the tolls and freights charged.

13. Dividends of so much of the profits of said company as shall appear advisable to the directors, shall be declared semi-

annually and be paid to stockholders or their legal rep-
34 resentatives on application at the office of said company,
at any time after the expiration of ten days from the time of declaring the same; but the Directors may reserve or set apart a portion of the profits as a contingent fund to meet expenditures and losses.

14. It shall be lawful for the County Court of any county in the State to subscribe to the stock of said company, or invest its three per cent. fund or any other internal improvement fund belonging to the county, as stock in said road; and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay for the same, and to take proper steps to protect the interests of the county; may appoint an agent to represent the county, vote for it, and receive its dividends. Any incorporated city, town or company may subscribe to the stock in said railroad company, and appoint an agent to represent its interests, give its votes, and receive dividends, and may take proper steps to guard and protect the interests of the said city, town, or company.

15. Said company shall have power to construct, extend, maintain, and operate their railroad and its branches beyond the limits of the State, and through any county of the State, and are hereby authorized to make contracts for the same, and shall have power to contract for, and construct all necessary bridges over streams on the line of said road, or its branches.

16. At every annual meeting of the company the Directors shall make to the stockholders an exhibit of the affairs and condition of the company. One-fifth part of the stockholders
may call a meeting of the company by giving four weeks'
35 notice in two newspapers.

17. When the road or any branch thereof is completed, the company shall file a plat thereof in the office of the Secretary of State; and the Legislature may at any time require a statement from the company as to the progress of the work, the amount of business, and the receipts of the company; and the books and accounts of the company may at any time be investigated by a committee appointed by the General Assembly.

18. If any person shall wilfully injure, obstruct, or destroy said railroad, or deface any work, edifice, fixture, or improvement, or other property belonging to said company, he or she shall be guilty of a criminal offense, and be punished in such manner as shall be prescribed by law; and shall be liable to said company for all damages by it sustained.

19. When any person shall cease to be a stockholder, he shall cease to be a member of the company. The operations of said company shall be confined to the general business of locating, constructing, maintaining, managing, and using said railroad, and the acts proper to carry the same into complete and successful operation.

20. The stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and regulations as the Board of Directors shall from time to time make and establish, subject however to the laws of the State, as the same may exist or may hereafter be changed. In case it shall appear at any time that the election of directors should not be made on any day when, pursuant to this act or any regulation of said company, it ought to have been
36 made, the said company shall not for that cause be deemed dissolved; but it will be lawful on any other day to make out and hold an election for a Board of Directors in such manner as shall be regulated by the by-laws and ordinances of said company.

21. Said company shall have power to receive and hold loans, gifts, grants and donations of lands, money or bonds, in any quantity from any county, State or government, or from any Indian tribe; it shall have power to hold mortgages on real or personal property to any extent, and to sell, convey, pledge, loan, mortgage, or otherwise dispose of said lands, bonds, money, or other property, or any part thereof; and to sell, barter, loan or pledge its own bonds, and apply the proceeds of the same to the construction of the road.

22. None of the provisions of the act entitled "An act concerning corporations" shall apply to said Laclede and Fort Scott Railroad Company except Sections four, five, seventeen and twenty-three of said act.

Each stockholder of the company shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of said company until the whole amount of the capital stock so held by him shall have been paid to the company; but no further liabilities shall attach to any stockholder in said company.

This act to take effect and be in force from and after its passage.

Approved January 11, 1860.

37 Exhibit "B"

United States of America

No. $1000

Bond of the County of Dallas.

Interest ten per cent per annum. State of Missouri

Know all Men by these [present-], that the County of Dallas, in the State of Missouri, is indebted to The Laclede and Fort Scott Railroad Company or bearer in the sum of One Thousand Dollars, lawful money of the United States of America, which the said County of Dallas, promises to pay at the German American Bank in the City of New York, fifteen years after date with interest thereon at the rate of ten per cent per annum, payable semi-annually at said Bank on the first days of January & July, in each year, upon presentation and surrender of the annexed coupons, as they severally become due and payable.

This bond is issued pursuant to an order of the County Court of the County of Dallas, made on the eighteenth (18) of May, A. D. 1871 (and amended on the nineteenth (19th) of June, A. D. 1871) by authority granted in the charter of the Laclede and Fort Scott Rail Road Company, approved January 11th, 1860.

In Testimony Whereof, the said County of Dallas, has executed this Bond by the Presiding Justice of the County Court of said County, under the order of said Court signed his name hereto, and by the clerk of said Court, under the
38 order thereof, attesting the same, and affixing hereto the seal of said Court.

This done at the office of said Clerk of said Court the 28th day of December, 1871.

J. R. GAUNNAN,
Presiding Justice County Court.

W. J. Loafman,
Clerk County Court.

Seal of the County Court Dallas Co., Mo.

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39 (Record Entry of filing of Bill of Complaint, Sept. 15, 1913.)

Now on this day comes the complainant by Harry J. Cantwell, and [file-] his bill in this cause, and on the motion of said solicitor a subpoena in equity is duly issued which said bill so

filed is in words and figures as follows and which said bill is indorsed filed Sept. 15, 1913.

JOHN B. WARNER Clerk.

(Subpoena in Chancery.)

United States of America,
Southern Division of the
Western District of Missouri—Set.

The President of the United States of America: To Dallas County, Missouri—Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the District Court of the United States, for the Southern Division of the Western District of Missouri, on twenty days from this date, at the City of Springfield, then and there to answer the bill of complaint of David Yost citizen of the State of Pennsylvania filed against
40 you on the 15th day of September, A. D. 1913, hereof fail not.

Witness the Honorable Ed D. White, Chief Justice of the Supreme Court of the United States, the 1st day of October, A. D. 1913.

Issued at office in the City of Springfield, under the seal of said Court, the day and year last aforesaid.

JOHN B. WARNER
Clerk of said Dist. Court.
By George Pepperdine Deputy Clerk.

Mem: The defendant to enter appearance in this suit in the Clerk's Office, on or before twenty days after he is served with same. John B. Warner Clerk By George Pepperdine Deputy Clerk.

United States of America,
Southern Division of the
Western District of Missouri—Set.

I do hereby certify that I executed this writ by Delivering a true copy hereof, together with a certified copy of the petition in the cause to John I. Maddux, Clerk of the County Court of the within named Dallas County Missouri.

All done at the Court House in the City of Buffalo, Dallas County, Mo. in the District and Division aforesaid this 3rd day of October, A. D. 1913.

Marshal's Fees:	Expense travel at ... cts.,		$30.87
2	service at $2.00		4.00
		Total	34.87

A. J. MARTIN,
U. S. Marshal, Western District of Mo.
By Harry J. Mead Deputy.

Indorsed: "Filed Oct 4 1913.

JOHN B. WARNER Clerk.
By George Pepperdine Deputy.

And on to-wit the same day September 15, 1913 the following further proceedings were had and entry of record made in said cause, to-wit:—

Now comes the complainant and files a petition asking for the appointment of a suitable person to act as master herein to take testimony, which said petition is as follows:

41 Petition for Order of Appointment of Examiner or Special Master to Take Testimony.

To the Honorable Judge of the District Court for the Southern Division of the Western District of Missouri.

Plaintiff says:

That in the above entitled cause now pending in this Court, a certain book containing the assessment of land values of Dallas County, Missouri, for the year 1913; a certain book containing the assessment of personal property in Dallas County, Missouri for the year 1913; and a certain book containing the assessments upon which taxes were levied for State and county purposes in Dallas County, Missouri for the year 1913, are material and necessary evidence to be offered by the plaintiff in the support of the allegations of the plaintiff's petition to establish and determine the taxable wealth of Dallas County, Missouri, made taxable by law for state and County purposes.

That the proof of the taxable wealth of Dallas County, Missouri, and of the assessment thereof as made for state and county purposes, are material issues in said cause and are necessary to be shown by the plaintiff in order to entitle him to the relief in the manner, substance, and form as prayed in said petition.

That said issues and facts can be established only by the production of said books, or copies thereof.

That the book containing the assessment of land values of Dallas County, Missouri, for the year 1913, is now in the possession and power of S. E. Gann, who is now assessor
42 of Dallas County, Missouri; that the book containing the assessment of personal property of Dallas County, Missouri, for the year 1913, is now in the possession and power of John I. Maddux, Clerk of the County Court of Dallas County, Missouri; that the book containing the assessment upon which taxes have been levied for state and county purposes in Dallas County, Missouri, for the year 1913, is now in the possession and power of James A. Bonner, the collector of the Revenue of said Dallas County, Missouri.

All of said persons being within this District.

That the plaintiff has good reason to apprehend that if the above named persons in whose custody, respectively, the said books are, learn of the materiality of the above named evidence in advance of the service of an order to produce the same, they will, before depositions can be taken or before said books can be compelled to be produced and identified in the usual course, conceal said evidence or abscond and conceal themselves so that the production of said books as evidence, and the attendance of said persons cannot be compelled by this Court.

The plaintiff says that the said persons have, by their acts, heretofore shown an intent to impede, obstruct and defeat the processes of this Court and the administration of justice in this behalf whenever an opportunity has been given them.

Wherefore the premises considered, and for the good and exceptional cause above stated for departing from the general rule, the plaintiff prays the Court for an order appointing some suitable person as Special Master or Examiner for the purpose of taking depositions of the above named witnesses in this cause, within this district, at such date as the said special master or examiner may fix, and that notice of the taking of said depositions shall be given by mail or telegraph to John I. Maddux, Clerk of the County Court of Dallas County, Missouri of such date and place as the said Master or Examiner may fix, said notice to be given twenty-four hours prior to the taking of said depositions, and that such notice shall state, only that depositions of witnesses shall be taken in the above entitled cause at a certain time and place on the part of
43 the plaintiff, without naming the witnesses then to be examined. That said order to be made by this Court authorize said Special Master or Examiner so to be appointed to compel the attendance of the above named persons as witnesses, and authorize the said Special Master or Exam-

iner to compel the production by each of said above named persons, respectively, of the several books before mentioned, before said Special Master or Examiner in order that copies may be made by photographic processes or otherwise, as the said Special Master or Examiner may then direct, and that this Court further order that the Marshal of this Court attend the said Special Master or Examiner at the hearing and taking of said testimony for the purpose of summoning said witnesses, and in order that the production of said books may be compelled.

H. CANTWELL,
Plaintiff's solicitor.

State of Missouri,
City of St. Louis—ss.

H. J. Cantwell, being duly sworn upon his oath, deposes and says that he is the solicitor for the plaintiff in the above cause, and he has read the foregoing petition and knows the contents thereof, and the facts therein stated are true to his own nowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

H. CANTWELL.

Subscribed and sworn to before me this 12 day of September A. D., 1913. My commission expires Sept. 17th, 1916.

(Seal) ROSE HEINMAN,
Notary Public.

Filed Sept. 15, 1913. John B. Warner, Clerk.

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44 (Order appointing Special Master, etc.)

Upon the petition of the plaintiff for taking of [deposition-s] and the appointment of a Special Master for that purpose being seen and heard by the Judge in Chambers, and for the good and exceptional cause for departing from the general rule being shown by affidavit, it is ordered by the Judge that George Pepperdine be appointed as a Special Master for the purpose of taking the depositions of S. E. Gann, John I. Maddux, and James A. Bonner, within this district, that said Special Master proceed as speedily as may be to the taking of said depositions at some point within the district, that the said Special Master give twenty-four hours notice of the time or times, place or places, respectively, when said depositions shall be taken by notice addressed to John I. Maddux, Clerk of the County Court of Dallas County, Missouri, which said notices shall be mailed or telegraphed to said John I.

Maddux, Clerk of the County Court of Dallas County, Missouri, at Buffalo, Mo., at least twenty-four hours prior to the respective taking of said depositions, or be served upon said Maddux by delivering said notice to said Maddux personally, that said depositions when begun, may be adjourned from day to day until completed. That the said notice may omit the names of the witnesses to be examined.

That the Clerk of this Court furnish the said Special Master with blank subpoenas to be filled out by said Special Master for the attendance of the aforementioned witnesses.

That the Clerk of this Court fill out under the seal of the Court an order or orders requiring the production before said Special Master of the following books, to-wit:

Order addressed to J. I. Maddux for the production of book containing the assessment of personal property of Dallas County, Missouri, for the year 1913;

Order addressed to James A. Bonner for the production of the book containing the levies of taxes for State and County purposes for the year 1913 in Dallas County, Mo.;

Order addressed to S. E. Gann for the production of the book containing the assessment of land values in Dallas County, Mo. for the year 1913.

That said orders for the production of said books shall, as filled out by the Clerk, order the production of said books respectively, before said Special Master leaving the place where, and the date when said books respectively shall be produced blank, and the Special Master shall fill said blanks for such places within the district and such time as he may fix.

That said Master proceed to the taking of said depositions in the usual course, and that making of copies of said books shall be proceeded with by speedy methods, [protographic] or otherwise, under the direction of said Special Master.

The Marshal of this district is hereby directed to attend the said Special Master at such times as may be required by said Special Master, for the purpose of serving the said subpoenas, the said orders for the production of said books, and of attending the said Special Master in the taking of said depositions.

SMITH McPHERSON, Judge.

Sept. 15th, 1913.

Indorsed: "Filed September 15, 1913. John B. Warner, Clerk".

(Motion of Complainant for Order of Substituted Service, etc.)

Now comes the plaintiff by his attorney and moves the Court for a subpoena and the order of Substituted service as prayed for in the petition in this cause.

H. CANTWELL,
Attorney for Plaintiff.

Filed Sept. 15, 1913. John B. Warner, Clerk.

(Order for Issuance of Subpoena and for Substituted Service, etc.)

Upon the presentation of plaintiffs petition duly [—] together with plaintiffs motion for an order for substituted service herein, it is ordered:

That subpoena issue to the defendant Dallas County, Mo. as prayed; that, in the event the Marshal shall not be able with reasonable diligence, to serve the said subpoena personally upon the Clerk of the County Court of Dallas County, Mo., that a copy of the subpoena and petition be posted upon the door of the office of said Clerk of the County Court of Dallas County, Mo., and that another copy of said subpoena and petition addressed to the Clerk of the County Court of Dallas County, Mo., be deposited in the United States mail postage prepaid and that upon proof of said posting and mailing the same shall be taken to be good and sufficient service
47 upon the defendant Dallas County, Mo., It is further ordered that copies of the petition may be mailed as provided in Section 4 of the prayer of plaintiffs petition, by the attorney for plaintiff, to the persons named and the mailing of said petition should be taken as sufficient notice to the persons therein named of the pendency of this action, but that the failure to mail copies of said petition shall not avail the said persons provided they be otherwise charged with notice or have actual knowledge of the proceedings herein.

It is further ordered that the Marshal post printed copies of the petition as provided in clause 4 of prayer of plaintiff's petition.

It is further ordered that copies of the petition and this order be mailed by the attorney for the plaintiff, postage prepaid, to each of the following persons, at the respective post office address of each, or to the respective attorney of each at his post office address, to-wit:

Alexander Dempster, Louis Krughoff, Henry D. Sexton and Lydia S. Hinchman.

It is further ordered that the said Alexander Dempster, Louis Kinghoff, Henry D. Sexton and Lydia S. Hinchman be respectively required to within 20 days after the mailing of the copy of the petition and order to each respectively, enter their appearance herein and joint as co-plaintiff, intervene or submit to and abide by any further order that may be made in this cause.

SMITH McPHERSON, Judge.

Sept. 15, 1913.

Attest: A true copy of the original order now on file in my office. Done at Office in Springfield, Mo.

Witness my hand and the Seal of this Court this 1st day of October, 1913.

....., U. S. Clerk.

By ....., Deputy.

Filed Sept. 15th, 1913, John B. Warner, Clerk.

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48 (Motion of Complainant to make Additional Parties Defendants.)

Now comes Harry J. Cantwell solicitor for plaintiff and shows the Court: That Lydia S. Hinchman, Henry D. Sexton and Louis Kinghoff have a common interest with the plantiff in the object of this suit, that all of said persons are inhabitants of other States and are absent from this District, that the said Lydia S. Hinchman, Henry D. Sexton and Louis Kinghoff have each respectively been notified by mail of this suit, but that the time fixed by order for their appearance has not yet expired. Your petitioner states that he believes from such information as is obtainable, that all of said persons intend to join as co-plaintiffs herein but that he has no positive information on the subject that in order that [thies] proceedings may afford adequate relief to the plaintiff, and that no unnecessary delay occur in getting all persons interested in the subject matter within the jurisdiction of the Court.

Wherefore your petitioner prays for leave to make the said persons to-wit: Lydia S. Hinchman, Henry D. Sexton and Louis Kinghoff defendants, and moves the Court for an order directing such absent defendants to appear, plead, answer, or demur to the petition herein before the .... day of November 1913 the said order to be served on said persons respectively, if practicable, wherever found; with case to have such per-

sons or either of them finally ranged as plaintiffs or defendants as their interest may later appear.

HARRY J. CANTWELL,
Solicitor for Plaintiff.

Ottober 18th, 1913.

49 U. S. A.
Southern Div. of Western District
State of Mo.
County of Greene—ss.

Harry Cantwell being sworn upon his oath deposes and says that he is the solicitor for the plaintiff herein, that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HARRY J. CANTWELL.

Subscribed and sworn to before me this 18th day of October 1913.

Filed October 18th 1913. John B. Warner, Clerk.

(Appearance of Alexander Dempster and Motion for Leave to be joined as Co-plaintiff, etc.)

Now comes Alexander Dempster and enters his appearance herein by Harry Cantwell his solicitor, and asks leave of Court to be joined herein as co-plaintiff with leave to file supplementary petition within ten (10) days from this date.

ALEXANDER DEMPSTER,
By Harry J. Cantwell,
His Solicitor.

Filed October 18, 1913. John B. Warner, Clerk.

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50 Petition for the appointment of a Master.

Your petitioner David Yost, by his solicitor states:

That, as shown by the petitions herein there are involved in this cause many motions of account, and the examination of many documents requiring many days for examination, that many hearings will be required, and many successive proceedings in order to effect the relief prayed for in the petition, that the regular Judge of this Court is required at other places in the District in the remaining division of the district and that said Judge by reason of the press of business in other divisions

of this district has been unable to sit in this division of the district more than six to ten days at each regular term—six months apart, that the proceedings sought in this suit in order to be effective requires the constant attention of an officer with Judicial powers, for several days in each month throughout each fiscal year.

Wherefore your petitioner prays the Court to appoint some suitable person as Master herein to whom this cause shall be referred under the direction and control of this Court.

DAVID YOST
Petitioner.
By Harry J. Cantwell,
His solicitor.

United States of America,
Southern Division of
Western District
State of Missouri—ss.

HARRY J. CANTWELL being sworn upon his oath deposes and says that he is the Solicitor for the plaintiff herein, that the statements made in the foregoing petition are true.

HARRY J. CANTWELL

Subscribed and sworn to before me this 18th day of October 1913.

SMITH McPHERSON,
Judge.

Indorsed "Filed October 18, 1913, John B. Warner Clerk."

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51 (Order granting Petition of Alexander Dempster to be joined as Co-plaintiff, etc., and making additional Parties Defendants.)

On this 18th day of October 1913 comes Alexander Dempster by Harry J. Cantwell, his solicitor and moved for leave to join as co-plaintiff herein and for ten days time to file supplementary petition herein which being seen and heard, it is ordered by the Court that Alexander Dempster be joined as co-plaintiff herein and that he file within 10 days from this date his supplementary petition.

Plaintiffs solicitor presents to the Court his motion for leave to make Louis Kinghoff, Lydia S. Hinchman, and Henry D. Sexton, defendants herein and for an order to such absent defendants, while being seen and heard, it is ordered by the Court:

That Louis Kinghoff, Lydia S. Hinchman, and Henry D. Sexton be made defendants herein and that such defendants respectively be required to appear, plead, answer, or demur in this cause before the 22nd of November 1913 and that this order be served upon said persons absent defendants, respectively wherever found.

And the Court reserves the right to hereafter class any or all of said above named persons either as plaintiffs or defendants as their respective interests may hereafter appear.

Done in open Court October 18 1913,

SMITH McPHERSON,
Judge.

Filed October 18, 1913, John B. Warner Clerk By George Pepperdine Deputy.

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52 (Motion of Defendant to Dismiss Bill of Complaint.)

To the Honorable Judge of United States District Court for the Southern Division of the Western District of Missouri:

Now comes the defendant, as if the subpoena herein had been properly served upon it, which defendant does not admit, and moves the Court to dismiss plaintiff's bill, for the following reasons:

1st. The facts alleged are insufficient to constitute a valid cause in equity.

2nd. Plaintiff has a plain adequate and complete remedy at law.

3rd. This Court possesses no power or authority to levy or collect a tax for the satisfaction of the judgments mentioned in plaintiff's bill, neither has it authority to appoint or designate any other person for that purpose.

4th. The granting of the relief prayed for by plaintiff would be an invasion of the Constitutional and sovereign rights of the State of Missouri, and its citizens.

5th. To levy and collect the tax prayed for in plaintiff's bill would tend to deprive the State of Missouri of the right it possesses as a Sovereign State, and secured to it by the Federal Constitution, and would destroy the Republican form of government guaranteed to it by that instrument.

Wherefore Defendant prays judgment and for costs.

J. W. MILLER
Defendant's Solicitor.

J. S. Haymes
Of Counsel.

Filed October 22, 1913, John B. Warner Clerk By George Pepperdine Deputy.

53

(Decree.)

David Yost, Complainant,
No. 3. against Equity.
Dallas County, Missouri, Respondent.

The motion of Defendant Dallas County to dismiss the bill of complaint was heretofore argued by counsel for both parties, both orally and by briefs, and the said motion was by the court taken under advisement.

And now at this time the court being fully advised, and for reasons stated in an opinion this day filed, sustains said motion.

It is therefore considered, ordered, adjudged and decreed that the motion of the defendant Dallas County to dismiss the bill of complaint of complainant, David Yost, be and the same is sustained, and said bill of complaint is dismissed and the case is dismissed all at the costs of complainant, which the clerk will tax, and if not paid within forty-one (41) days, an execution will issue therefor.

To every of which complainant excepts.

Done this February 9th, 1914.

SMITH McPHERSON
Judge.

Filed "Feb 9, 1914, John B. Warner Clerk By George Pepperdine Deputy."

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54 (Opinion of District Court.)

H. J. Cantwell of St. Louis, Missouri, For Complainant;

J. S. Haymes of Buffalo, Missouri, J. W. Miller of Buffalo, Missouri, For Respondent.

Smith McPherson, Judge.

This case is pending on a bill of complaint and the motion of respondent to dismiss the case, standing in lieu of what formerly would have been a demurrer. Complainant is the owner of a judgment for something more than one million dollars against the defendant county, which with judgments in favor of other parties aggregate nearly or quite two million dollars. These judgments were rendered at different times by United States courts for this District, based upon bonds of the county issued in the year 1871 under a statute of January 11, 1860, to aid in the building of the Laclede & Fort Scott Railroad. Parts of these judgments bear interest at ten per cent, others at seven per cent, and still others at six per cent per annum. The county has never paid anything on the bonds or the judgment, which bonds originally only amounted to a few hundred thousand dollars. As I understand it, little or no part of the work was done on the railroad and the people received no benefits therefrom; but the bonds having been sold were held to be a legal liability of the county, resulting in these judgments.

The tax levy, as authorized by statute, if collected and paid, would be less than the interest on the judgments, so that unless there is a substantial increase in the value of taxable property in the county, no part of the principal of these judgments can ever be collected, and only part of the interest thereon. The county court, comprised of three officers
55 has many times refused to make the tax levy or do any other act looking toward the collection of the money. The judgments have been revived from time to time, followed by writs of mandamus against the county officers to make the levies to apply on the judgments.

The officers from time to time have evaded service of the writs and proceedings following for punishment for contempt. When closely pressed these officers would resign. Sometimes a majority of the board will vote against taking any action, with the minority voting therefor, and then when pressed the majority resigning. Prior to their election as members of the board, the parties are required to pledge themselves that they will go to jail if necessary in contempt proceedings, but that under no circumstances will they make the levies. The members elected have no property other than such as is exempt to

them, and there is no method by which money can be obtained by the ordinary proceedings to satisfy such judgments in whole or in part. It is alleged that all statutory methods for collecting money to apply on the judgments are utterly unavailing, and that the writ of mandamus and all other proceedings at law are also unavailing.

On these and similar allegations complainant asks for the appointment of a person to take the necessary steps to have the tax rolls completed and the property of the citizens of the county, or so much thereof under the taxing power sold as will bring about the payments to apply on these judgments. The basis of the bill of complaint is that the indebtedness created by the bonds and now carried forward into judgments, and the statutes under which the bonds were issued (and the statutes which are now in force), created a trust fund, and to the end that the trust may not fail that this court appoint a suitable person to bring about the execution of the trust by coercing the payment of taxes to apply on these claims.

The motion of the defendant to dismiss is based upon the general proposition that this court is without power to make such an appointment, with the powers vested in him as is prayed for.

56 Some propositions need only be stated without argument:

A trust is never allowed to fail because of the vacancy in the office of trustee.

Equity will consider that as done which ought to be done.

When contractual rights exist, the repeal of a statute or such modification thereof as to leave no adequate remedy will be regarded as void, because of the clause of the United States constitution which prohibits the impairment of a contract.

Ordinarily the assessment and levy and collection of taxes is a legislative and administrative act, and not a judicial act.

Courts, both national and state, sitting in equity have the power to enjoin the enforcement of a void statute imposing taxes, and to enjoin the collection of taxes when void. This is so because of the power of a court of equity to remove a cloud on the title of real estate, and having the power to thus remove the cloud, such courts have the power to prevent the cloud from being created.

This court is inferior only to the supreme court and the circuit court of appeals; otherwise it is not an inferior court. It is a court of limited jurisdiction. But when it does acquire

jurisdiction by reason of the subject matter, diversity of citizenship, or for any other reasons, it has all the power of any court of record, subject only to have its orders, judgments and decrees corrected by appellate proceedings.

A national court sitting in equity is not confined to state statutes as to its equitable powers. A national court may and will exercise all the powers of a court of equity according to the general principles of equity jurisprudence. State statutes can in no wise impair or limit such powers of a national court sitting in equity. But a national court may adopt such powers of a state court sitting in equity as conferred by state statute. In other words state statutes may give additional grounds to a national court sitting in equity for action; but a state statute can not limit the powers of this court.

57 Ordinarily, for every wrong, as well as for every cause of action, there is a remedy; but this remedy does not necessarily exist down to the collection of money. Complainant, both in his bill and in his brief, makes the suggestion that the other judgment creditors be brought before the court and that arbitration be decreed, suggesting the name of George Pepperdine, Esq., deputy clerk of this Court, as a suitable person to bring about an adjustment of these bonds and the judgments thereon. Mr. Pepperdine is a lawyer of great ability and is in every respect a person this court should appoint, if that were feasible. He has the confidence both of the judgment creditors and of the people of the defendant county. I assume that the people of the county would be glad to have such an adjustment made as would bring the indebtedness within their reasonable reach. This indebtedness, tremendous in proportion to the population and taxable property of the county, ought to be adjusted, and possibly this court through any one of its judges, or by the efforts of Mr. Pepperdine, could bring about such an adjustment. This indebtedness seriously delays the advancement of the county, and is extremely prejudicial to its future prosperity. I assume that these judgment creditors gave nothing like the face value of the bonds or the judgments they now own. It would be fair and conscionable that they be paid what they have given for these claims, with a reasonable rate of interest thereon, which could be easily paid in money or by bonds running for a reasonable length of time, with reasonable interest, and this in a short time would result in the extinguishment of all the indebtedness. If the judgment creditors and the county would meet on such a plane as this, it would be by far the best for all concerned; but thus far there has not been an agreement to thus arbitrate and adjust the differences. Unless the popula-

tion of the county does increase, with a corresponding increase in property values, no part of the principal of the debt ever can be paid. I assume that the people of the county are smarting under what no doubt they believe to be a great
58 wrong in the imposition of this indebtedness by the voters many years since. This court would gladly lend its aid and influence to bring about such an adjustment as has been done in Macon County, Missouri, and perhaps other counties of the State. But as anything in the nature of an agreement has not been disclosed if made, this court can only consider the questions as presented by the bill of complaint and the motion to dismiss the case.

"The flexibility of decrees of a court of equity will enable it to meet every emergency,"

wrote Justice Field in Sharon vs. Tucker, 144 U. S., 533, 548.

But courts of equity, like courts of law, can only perform judicial duties [only], and the question here is as to whether the acts of a commissioner or master, which complainant asks to be [ap-ointed], [a] can be clothed by a court with such powers as to levy taxes and make collection thereof to apply on a contractual debt.

It will not do to lose sight of our system of government, national and state; the strength of which is because we have three co-ordinate branches, each equal in rank. Neither can perform the duties of either of the other. The Executive alone may grant pardons, command the military, and do all other executive acts. Neither the legislative branch nor the courts can order him. The legislative body can enact legislation, and neither the executive nor the courts can command it to act or not to take action. The courts from the earliest days of our government have enjoined the enforcement of void statutes. But that is not giving legislative power to the courts. The legislature can fix rates of charges for public utilities, and courts can not do that. But courts will enjoin the enforcement of confiscatory rates, because to so enjoin is a judicial act. The legislature and it alone provides for the levy and assessment of taxes, because a legislative act. But if the tax is beyond the authority of the legislature under the constitution, courts will enjoin, because so doing is a judicial act. Congress at one time sought by legislation to require judges to perform executive and administrative acts under the
59 pension laws. Justices of the supreme court wisely refused to obey the statute. State legislatures have repeatedly adopted similar statutes. But that such legislation is void, see State of Iowa vs. Parker, 116 Iowa, 96 (89 N. W.

Rep. 204), where many of the authorities, national and state, are collected. The result of it all is that neither department can be either coerced or permitted to take over the powers of another department of government. And that the power of taxation, the rate of taxation, the time and method of collecting taxes, penalties for non-payment, and all things relating thereto, are solely within the powers of the legislative branch of government like our nation and states, can not, as it seems to me, admit of argument. And it seems equally clear that if the methods or agencies to collect are not efficient, the corrective remedy is with the legislature only, and wholly beyond the power of either the executive or of the courts. If the courts are not empowered by statute to aid in taxation, they are powerless to act other than by mandamus. The sole question is, How, if at all, can the money be collected? Legal remedies may fail. Imprisonment for debt did not procure the money [of-times] from solvent debtors. Auxiliary or supplementary proceedings to execution returned "nulla bona" do not in all cases secure from solvent debtors the money. Writs of mandamus as in this case do not procure the money. But that is not the test, and the question recurs as to whether the courts can resort to the powers belonging to the legislative branch as to taxation and methods of collecting the same.

I am of the opinion that from principle such powers are not in the courts.

But complainant's counsel insists that the precedents sustain his contention. It would carry me beyond the limits of an opinion to review all cases cited by him. But there is not one appellate court case that can be cited holding that in the absence of legislative authority the courts can or should exercise the power. I mean to make this statement broadly. As of course, I do not mean to say that fragmentary dictum
60 sustaining him can not be read into an opinion. I do not mean to say that loose writings can not be read from text books apparently otherwise in holding. The same is true as to one or more dissenting opinions like that of Justice Harlan in Thompson vs. Allen County, 115 U. S. 550, 561. It is claimed that State vs. Middle, 106 Pac. Rept. 203 (Washington), is in point. That was an action at law asking for a writ of mandamus to compel the defendant, a drainage district, to issue and sell certain bonds and apply the proceeds in satisfaction of a judgment against the district. One of the officers being insane, later dying, the court held that a commissioner could be appointed to act for the board. It was held that a State statute authorized the order, and that was the only point decided. Campbellville vs. Huboert, 112 Fed. Rep., 718, by

the fifth circuit court of appeals was based on a statute. Supervisors vs. Rogers, 7 Wallace, 175, is cited. That was an Iowa case, but transferred to another court for trial. The court held that a commissioner could be appointed. But the holding was expressly based on a then existing Iowa statute, which from its reading and construction by the state courts authorized it.

Many cases are cited holding that if the assessment has been made, the levy made, and the tax collected, that a mandamus will be ordered against the officer having the custody of such money to apply it on the creditor's claim. All should agree that that question is not akin in any degree to the question now under consideration. I refer to no other cases cited by complainant's counsel. To do so would only mean to cite them and then show that they are not in point. If there are any cases in point sustaining complainant's contention, I do not know of them.

It is claimed that the statutes in force when the bonds were issued, and other statutes providing for taxation and the collection of the money to apply in payment of the bonds, of themselves create such a trust that a court will appoint a trustee to execute the trust. This is plausible only, but when applied to a matter such as a governmental (including a county
61 taxation scheme), the matter comes back to the method of taxation and the collection of the taxes. And this can only be corrected or enlarged by legislative action.

The following cases are against the entire theory of the bill of complaint herein: Walkley vs. City of Muscatine, 6 Wallace, 481; Rees vs. City of Watertown, 19 Wallace, 107; Hein vs. Levee Commissioners, 19 Wallace, 655; Meriweather vs. Garrett, 102 U. S., 472; Thompson vs. Allen County, 115 U. S., 550. The Thompson case has been followed as will be seen by reference to Vol 10, Rose's Notes, 1167, citing among other cases Crawford County vs. Laud, 110 Iowa, 355 (81 N. W. Rep., 591).

The motion of defendant, Dallas County, to dismiss complainant's bill of complaint, will be sustained.

And it is so ordered.

Springfield, Missouri
February 9, 1914.

"Filed Feb. 9, 1914. John B. Warner Clerk By George Pepperdine Deputy."

Assignment of Errors.

Now on this 13th day of March 1914 comes the plaintiff, by his solicitor, Harry J. Cantwell, and says that the decree entered in the above cause on the .... day of February 1914 is erroneous and unjust to the plaintiff.

1st. Because the Court erred in sustaining the motion to dismiss.

2nd. Because the Court erred in dismissing the petition and the cause.

62 3rd. Because the Court erred in holding that the petition did not state a cause of action in equity,

4th. Because the Court erred in holding that it was without power or jurisdiction to afford any equitable relief,

5th. Because the Court erred in holding that it was without jurisdiction to administer the relief specifically prayed.

6th. Because the Court erred in holding that it was without power or jurisdiction to enforce its own judgments.

7th. Because the Court erred in holding that the relief prayed for would constitute an invasion of the powers of the other departments of government.

8th. Because the Court erred in holding that the United States courts are powerless to enforce their lawful mandates against the will of the agents of a debtor municipality.

9th. Because the Court erred in holding that the agent [od] a municipality might by violating their oaths of office effectively impair and destroy the obligations of contracts.

10th. Because the Court erred in holding that further permission or authority was necessary from the Legislation of Missouri before the United States Court could enforce its lawful jurisdiction in the premises.

11th. Because the Court erroneously held that the power of the United States Courts to enforce its judgments against municipalities in Missouri was limited to the issuance of a mandamus and that such power did not extend to the enforcement of the order.

12th. Because the decree herein denies to citizens of other States rights which they might under the laws of Missouri enjoy in the State courts and because the [demur-er] denies the plaintiff the equal protection of the laws.

13th. Because the decree herein impairs the obligation of contracts.

14th. Because the Court erroneously held that this cause was in [inffect] a suit against a State whereas no power of any [gover-mental] department of the State of Missouri would be invaded by the granting of the relief asked.

63 15th. Because the Court erred in holding that the exercise of the powers prayed to be exercised would constitute an unwarranted exercise of judicial power whereas power to perform such acts have been conferred upon the judicial department of the State of Missouri by the State of Missouri and the Courts of the United States are entiled to exercise all such judicial powers in the exercise of jurisdiction once lawfully acquired.

HARRY J. CANTWELL,
Solicitor for plaintiff.

Filed March 16, 1914. John B. Warner, Clerk. By George Pepperdine, Deputy.

Petition for appeal filed March 13th 1914, in the District Court of the United States for the Southern Division of the Western District of Missouri.

To the Honorable Arba S. VanValkenburgh, District Judge of said District.

The above named Plaintiff feeling [himseld] aggrieved by the decree made and entered in this cause on the....day of February 1914 does hereby appeal from said decree to the Circuit Court of Appeals for the 8th Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit
64 Court of Appeals for the 8th Circuit, sitting at St. Paul, Minn, that upon said appeal said decree be issued. And your petitioner further prays that the order touching the security to be required of him to perfect his appeal be made and desiring to supersede the execution of the decree, Petitioner here tenders bond in such amount as the Court may require for such purposes, and prays that with the allowance of the appeal, a supersedeas be issued.

HARRY J. CANTWELL,
Solicitor for David Yost Plaintiff.

The appeal is allowed, bond in the sum of $500.00 approved, and supersedeas ordered.

ARBA S. VANVALKENBURGH,
District Judge.

Indorsed: "Filed March 16, 1914. John B. Warner, Clerk. By George Pepperdine, Deputy."

Bond on Appeal.

Know all men by these presents:

That we, David Yost as principal, and John F. Weinert and J. E. Lamelin, as surety acknowledge ourselves indebted to Dallas County [appel-ee] in the above cause in the sum of Five Hundred ($500.00) conditioned that whereas on the.... day of February A. D., 1914 in the District Court of the United States for the Southern Division of the Western District of Missouri in a suit depending in that Court wherein David Yost was plaintiff and Dallas County was defendant numbered on the equity docket as a decree was rendered against the said David Yost, and the said David Yost having obtained an appeal to the United States Circuit Court of Appeals, and filed a copy thereof in the office of the Clerk to reverse the said decree and a citation directed to the said Dallas County citing and admonishing it to be and appear at a session of the United States Court of Appeals for the 8th Circuit to be held in the City of St. Paul in the State of Minnesota on the 4th day of May next, Now if the said David Yost shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good then the above obligation to be void else to remain in full force and [vestue.]

65

Witness our hands and seals this 12th day of March 1914.

(Seal) DAVID YOST,
(Seal) JOHN F. WEINERT,
(Seal) J. E. LAMELIN,

Approved:
Arba S. VanValkenburgh,
District Judge.

"Filed March 16, 1914. John B. Warner, Clerk. By George Pepperdine, Deputy.

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66 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division of the Western District
of Missouri—Sct.

I, John B. Warner, Clerk of the District Court of the United States for the Southern Division of the Western District of Missouri: hereby certify that the above and foregoing is a full, true and correct copy of the records and proceedings and all things connected therewith in the case of David Yost, Complainant and Dallas County, Missouri, Defendant. In Equity, as full as the originals on file and of record in the Clerk's office. And further certify that the original citation is hereto attached and herewith returned.

Witness my hand as Clerk and the seal of said Court at Springfield, Missouri, in said District this 28th day of March, A. D., 1914.

Seal
U. S. Dist. Court
Southern Division
Wes. Judicial Dist.
Missouri

JOHN B. WARNER,
Clerk.

By George Pepperdine,
Deputy.

Filed Mar. 30, 1914. John D. Jordan, Clerk.

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

David Yost,
Appellant,
vs.
Dallas County,
Appellee.
} No. 4186.

The Clerk will enter my appearance as counsel for the appellant.

HARRY J. CANTWELL.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 18, 1914.

(Appearance of Mr. John S. Haymes as Counsel for the Appellee.)

The Clerk will enter my appearance as counsel for the appellee.

JOHN S. HAYMES,
Buffalo, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 20, 1914.

(Appearance of Mr. J. W. Miller as Counsel for the Appellee.)

The Clerk will enter my appearance as counsel for the appellee.

J. W. MILLER,
Buffalo, Mo.

Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 21, 1914.

(Order of Argument.)

May Term, 1914. Tuesday, June 2, 1914.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Harry J. Cantwell for appellant and continued by Mr. John S. Haymes for appellee, and the hour for adjournment having arrived, further argument is postponed until tomorrow.

(Order of Submission.)

May Term, 1914. Wednesday, June 3, 1914.

This cause having been called for further hearing, argument was resumed by Mr. John S. Haymes for appellee and concluded by Mr. Harry J. Cantwell for appellant.

Thereupon this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

(Order to Certify Questions to Supreme Court, U. S.)
May Term, 1914. Monday, August 3, 1914.

In the above-entitled cause certain questions having arisen on the record upon which this Court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such questions having been prepared and duly signed, it is now here ordered by this Court that such certificate be filed and entered of record in this court, and that the original of said certificate be duly certified by the Clerk of this Court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

August 3, 1914.

Memorandum of Clerk:

Certain questions were certified by the Circuit Court of Appeals of the United States for the Eighth Circuit to the Supreme Court of the United States in this cause, under date of August 3, 1914, the original of which certificate of questions was transmitted to the Supreme Court, and for that reason a copy of same is not included in this transcript.

(Stipulation for Correction of Printed Record.)

It is stipulated and agreed that the following errors in typewriting in the transcript may be corrected in the printed record to conform to the original documents, to-wit:

Page 28, lines 11 and 22, "H. Cantwell" should be **H. J. Cantwell.**

Page 31, the word "Kinghoff" on lines 2, 22, 25 and 37 should be **Krughoff**; on line 31, the word "thies" should be **these.**

Page 32, lines 10 and 23, "Harry" should be **Harry J.**

Page 34, lines 2 and 6, "Kinghoff" should be **Krughoff.**

Page 42, line 23, "od" should be **of**; "agent" should be **agents**; line 27, "Legislation" should be **Legislature**; line 33, "Demurrer" should be **decree.**

Page 43, line 4, "ineffect" should be **in effect**; line 5, "Governmental" should be **Governmental**; line 10, "have" should be **has**; line 13, "entiled" should be **entitled.**

J. W. MILLER,
Atty. **of** *Appellee.*

HARRY J. CANTWELL,
Solicitor for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, June 2, 1914.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings had and filed in the United States Circuit Court of Appeals except the certificate of the questions of said Circuit Court of Appeals to the Supreme Court of the United States, and the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein David Yost is appellant, and Dallas County is appellee, No. 4186, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of October, A. D. 1914.

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal of United States Circuit Court of Appeals, Eighth Circuit.)

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SYLLABUS OF BRIEF.

1. The questions certified by the Court of Appeals include only the general reasons for the enforcement of jurisdiction by United States courts. It appearing that the State of Missouri has adopted certain means in similar causes for enforcement of jurisdiction of its judiciary, such fact is material to the determination of such questions, and the writ of *certiorari* should be granted.

2. The means to be employed by the United States courts, in the enforcement of their lawful jurisdiction, are limited only by the determination of whether such means are necessary, and agreeable to the principles and usages of law.

3. *Mandamus* is but a means to compel the specific performance of acts, the performance of which, in a given case, the Court is empowered to command. *Mandamus* is a means; not an end.

4. When the taxing power of the State has exercised its functions; when the legislative power has enjoined upon the agents of a taxing district duties to be performed by them in raising a special fund to pay a debt authorized by law and contracted in reliance upon such fund; when the State has imposed upon the judiciary of the State the power and duty of enforcing the performance of such duties by such agents, by *mandamus* or otherwise—with power, in addition, to

appoint substitutes for such agents; when there is no act remaining to be performed requiring discretion, the courts of the United States may employ other means than *mandamus* to secure the specific performance of such acts when the writ of *mandamus* has been proven ineffective and has been treated with contempt; and, particularly, when the end which will be accomplished by such means is the identical result which would have been accomplished had the writ of *mandamus* been obeyed.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

DAVID YOST, Petitioner,

vs.

DALLAS COUNTY, Respondent.

No. 604.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The propositions of law, as certified by the United States Circuit Court of Appeals for the Eighth Circuit state, in precise and potent language, the grounds for equity jurisdiction by reason of the inadequacy of the remedies at law, and to avoid a multiplicity of suits. In addition, there is shown a strong case for the application of the general principle that all courts are entitled to exercise whatever means may be necessary to maintain their lawful jurisdiction and to enforce all

orders which they may lawfully make.

But the record shows more than this, and considered in connection with the laws of the State of Missouri, which were fully presented below, adds special and peculiar grounds for the exercise of equity jurisdiction and for the application by the Federal Courts of the relief asked.

This court has always shown a delicate consideration for any objection that a proposed proceeding in the Federal courts would interfere with the rights of a State or with the proper functions of another department of government. Your petitioner believes that an examination of the whole record, together with consideration of the laws of the State of Missouri, will affirmatively show that the exercise of jurisdiction herein and the award by the Federal Court of the relief asked will neither interfere with the rights of the State of Missouri nor constitute an invasion by the judicial power of the powers of another department of government. The two factors which are omitted from the questions certified and which show that such objections would in this case be baseless are:

(*a*) That by the laws of Missouri and the rulings of the highest court of that State when, as here, the rights of a tax creditor are involved the agents of a municipal corporation occupy the same relation to the creditor, and are as subject to the control of a court, as would be the agents of a private business corporation; and,

as upon the facts stated, the right to relief would be undoubted if defendant were a business corporation, upon such law and rulings the right to relief here should, as inevitably, follow. It further follows that, as the State of Missouri itself has by law authorized the imposition of the tax, as these agents of the municipal corporation are violating the laws of the State of Missouri by refusal to perform the acts, it does not lie in the mouths of such agents of the municipal corporation to say that they are the representatives of the State; neither does it appear that they are the authorized representatives of the persons who would eventually pay the tax, for presumably the agents were elected to obey the law and not to violate it; neither have such agents any claim to the right to personally perform that which they have already refused to perform.

(*b*) The jurisdiction of the United States Court is limited only by the provisions of the statute which require that in the exercise of their jurisdiction such means be used to effectuate jurisdiction as are "necessary" and "agreeable to the usages and principles of law." If the means used be such means as the judiciary of the State may, both at law and in equity, lawfully employ, then the use of such means by the Federal Court, within the State of Missouri, in the exercise of its duty to administer justice between citizens of different States, is "agreeable to the usages and principles of law."

Your petitioner shows by the laws of the State of Missouri cited herein that the courts of the State of Missouri have the right, power and duty to compel the performance of the duties required of such agents, in similar cases, by **"mandamus or otherwise"**.

Further, if it be shown, as petitioner undertakes, by the citations hereafter, that the High Court of Chancery of England, to whose powers and practice the equity courts of the United States look for analogies as to what powers should be exercised in equity, has exercised similar powers over taxing districts in the protection of rights to funds to be raised by taxation, when the debt was created in reliance upon such fund so to be raised by taxation, when the tax was authorized by the legislative power, and if, in addition, it be shown that the judicial power of the State of Missouri asserts its right as its inherent powers as a court of equity to complete control over all matters of taxation when the tax is authorized by the legislative power, then petitioner conceives that such facts and laws are material factors in the consideration of the propositions involved, for such factors conclusively show that the proceeding herein is "agreeable to the usages and principles of law," and do not constitute an usurpation of judicial power when exercised within the State of Missouri, whatever might be the conclusion if such powers were exercised elsewhere, or if such factors were absent.

As before stated, the propositions of law certified to this court present only the general right of courts to enforce their lawful jurisdiction and to compel obedience to orders which, it is conceded, the court was authorized to make; and while petitioner's rights are strong upon that ground, yet they are reinforced by the special features applicable to a proceeding in Missouri.

The record below shows:

Upon the record the facts stated in the petition are admitted.

The petition shows the express authority of the Legislature of the State for the creation of the debt by the issue of the bonds, the actual creation of the debt, in accordance with the authority of the Legislature; that the Legislature specially authorized the creation of a fund to pay the debt by making mandatory the levy and collection of a tax upon certain designated property, upon a valuation of the property made fixed and certain, to an amount not to exceed in any one year 30 per cent of the original debt; that the Legislature specially provided that this special fund which was to be raised for such purpose should be kept apart from other funds and appropriated to the payment of no other purpose than the payment of this debt; that by the said acts of the Legislature and by the creation of the debt in accordance therewith, a contract was made and a trust created that said funds would be raised for the payment of said debt; that judgments at law have been

regularly obtained establishing the debt; that executions have been issued and returned *nulla bona;* that writs of *mandamus* have been repeatedly issued commanding the specific performance of this contract to pay the debt; that special writs of *mandamus* have been issued to levy a special tax to raise the fund to pay the debt; that the agents of the county have refused to obey the writs of *mandamus;* that the agents of the county are now in contempt of the Federal Court for their refusal to obey said writs; that a general conspiracy exists among the agents of the defendant and the inhabitants of the county to defeat the process of the court and all effort to collect the debt; that the amount of the special tax to pay the debt and the debts of other creditors named in the petition is fixed and certain; that the valuation of the property out of which said special tax should be raised is fixed and certain; that there is no discretionary act to be performed by the agents of the defendant; that there are only the ministerial acts of apportioning the amount which, under the law, should be raised as a special tax against the owners of property now on the assessment rolls, of collecting the same and of apportioning the sum, *pro rata,* to the plaintiff and other creditors similarly situated, to be performed.

The petition alleges and enumerates the other creditors who are entitled to share, *pro rata,* in the fund to be raised; sets up the necessity for accounting, for

the marshaling of assets; for, in effect, equitable garnishment; shows the inadequacy of the remedies so far applied, by reason of **the violation of the oaths of office of the agents of the county**; and prays for the appointment of a commissioner to perform the ministerial acts which the agents of the defendant refuse to perform, and shows that it has been conclusively and finally adjudicated that the plaintiff is entitled to the performance of such acts.

The petitioner contends and shows by the statutes and decisions of the highest court of the State that the Legislature of the State of Missouri has committed to the judiciary not only the general duty of superintendence and control over these agents of the county, but the regulation and enforcement of all matters of taxation and revenue—not only the enforcement of taxes against individuals, but the imposition itself of the tax is under the control of the judicial power; that in the exercise of the equitable powers of the state courts and, independent of statute, the state courts, at the suit of any individual who is interested in the tax will interfere by injunction againts the imposition of an unlawful tax; and that power is specially granted by the Legislature to the judiciary to enforce taxes at the suit of a creditor, by "*mandamus* **or otherwise**"; and that the duty of enforcing the specific performance of all acts necessary to create the fund and pay this particular debt herein was specially enjoined upon the judi-

ciary by statute of the State of Missouri. The petitioner contends that, **as mandamus is but one means of enforcing specific performance,** if such means be defeated by the agents of the debtor, the debtor cannot complain of the employment of other means to obtain specific performance, when the **effect and end to be attained is the same as if the mandamus had been obeyed.**

It is not to be doubted that if the respondent were a private corporation, or an ordinary individual, the facts set out would constitute a perfect cause of action in equity, and that effective relief would be granted as prayed in the petition.

THE GROUNDS OF RESPONDENT'S OBJECTIONS BELOW.

What, then, are the grounds set up below by respondent for its claims of exemption from the operation of general rules of equitable procedure? For what reason should it escape payment? What are the grounds of immunity from control by which it defies the Federal court and deprives the creditor of redress? The following states the essence of these claims of exemption and immunity from control:

1st. That equity cannot in this case exercise its acknowledged jurisdiction over trusts, because, appellee says, there can be no trust and no trust fund until the fund is actually collected!

If appellee is wrong about this, then equity surely has jurisdiction and all remedies known to equity may be applied.

2nd. That because, forsooth, *mandamus* might be an effective remedy if it had been **obeyed**, plaintiff is limited to the issuance of a writ **commanding** the performance of the act, **AND not to the performance**. This contention proceeds upon the assumption that having heretofore obtained a common law judgment, **no matter what other grounds of action** we may set up, in addition to the necessary one, in equity, that we had reduced our demand to a judgment at law, we have forfeited all right to other remedies by going into a United States Court!

3rd. While the right to "interfere" with these agents by *mandamus* is conceded; while this is constantly urged by respondent as our only remedy; it is insisted that to secure the **performance** of the same act which would be performed had the writ of *mandamus* been obeyed, by means other than *mandamus*, would and does constitute an invasion of the powers of the State by the Federal judiciary!

4th. The general objection that equity courts are limited in their jurisdiction. The grounds of this objection are not made clear; at least, the grounds are constantly confused. The point that Congress has granted no power to Federal courts to control political powers of other departments, or to direct officers of other de-

partments, in matters of discretion, are undoubted; but this has no relevancy to the control over ministerial acts of minor officers who are violating the laws of the State in denying private rights of litigants who are under the protection of the United States courts. The contention that the equity court should be denied jurisdiction because such jurisdiction would be an improper exercise of judicial power can have no force where the right of the law court to order the same act is conceded —for as an exercise of judicial power, if objectionable at all, it would be just as objectionable if the act were performed by the law side as it would be on the equity side. The objection that the action sought is an invasion by the judiciary of the powers of other departments of the State can have no force when the judicial power of the State is charged with that duty. The point that neither equity nor law can levy a tax because such an act would be an interference with the power of the Legislature can have no relevancy to the facts of this case, **for the Legislature has already performed all of the acts which it can perform by authorizing the levy of the tax.**

POINTS AND AUTHORITIES.

I.

Mandamus is but the means to compel the specific performance of an act which the person commanded to perform is in duty bound by law to perform. In speaking of *mandamus* in aid of execution, this court has said: "*Mandamus*, in this class of cases, is in the nature of a suit to enforce the specific performance of a contract."

Antoni v. Greenhow, 107 U. S. S. C. 781.

Mandamus is not an end; it is but a means to specific performance.

II.

The power of the district courts of the United States to issue mandamus exists only because it is one of the writs which may be used to enforce its jurisdiction. The object of mandamus is to compel the specific performance of the act. If the facts and the law do not authorize the court to compel the specific performance of the act, then they do not authorize the issuance of the writ; if the facts and the law do authorize the issuance of the writ, then the court is not limited to the issuance of a writ of mandamus, when such writ is disobeyed. The authority conferred by United States statute is, not to issue mandamus, for that has not been

specifically provided for by statute of the United States, but:

> **"To issue ALL writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."**
>
> Sec. 262, Judicial Code.

III.

The United States court is not confined in its remedies, when a perfect cause of action in equity is stated, to the remedies provided by the statutes of Missouri, but may adopt same; and the fact that the Legislature of the State of Missouri commands the judiciary of that State to enforce the specific performance of all duties connected with the levy and collection of a tax and of the acts to accomplish payment to the creditor conclusively shows that any necessary writ, proceeding or remedy which might be employed between individual suitors to compel the specific performance of such acts would be agreeable to the usages and principles of law, and particularly when the remedy is analogous to that which has been applied under ancient chancery practice. The law in force at the time of the passage of the act authorizing the creation of this debt authorized a proceeding by mandamus to issue against officers refusing to perform any of the duties required to be performed. To what end, for what purpose was

mandamus to be issued? To compel specific performance of the act, and for no other purpose.

The law in force making it the duty of the agent of the municipal corporation to levy the special tax to pay the debt further provides:

> "Sec. 35. Any County Court refusing to perform any of the duties required of it by this act may be proceeded against by writ of mandamus to be issued out of the Criminal Court for the county so refusing."
>
> Page 438, Vol. 1, Revised Statutes of Mo. 1855.

The law in force at the time the bonds were actually issued and delivered provided:

> "Sec. 22. Any County Court refusing to perform any of the duties required of it by this chapter may be proceeded against by writ of mandamus to be issued out of the Circuit Court for the county so refusing."

This provision, coupled with the duty conferred by the Constitution and laws of the State upon the Circuit Court of exercising a "superintending control" over the County Court, certainly does not limit the remedy to the **ISSUANCE** of a writ of mandamus. The Legislature clearly intended to confer upon the court of general jurisdiction the power **to COMPEL the performance of the duties with relation to this special tax.** The defendant contends that the plaintiff is limited

in his remedies to the **issuance** of a writ of mandamus, **not to its obedience**; to an exhortation to pay the judgment, not to payment! Did the Legislature intend to confer upon the petty agent of the municipality the power to destroy the availability of this fund to the creditor by the simple expedient of the petty agent refusing to obey the writ, and that thereupon the judicial arm should be paralyzed? Majestic states, acting through all of their powers of government, have not been able to destroy the **obligations of a contract** (which includes the duty of performance).

Curran v. State of Arkansas, 15 How., *l. c.* 320.

And yet here, according to the defendant, has been found a safe and secure way to do so by the petty agent of a municipality! Is it not a conclusion consonant with reason and regardful of the dignity of the Legislature of Missouri that, by this provision, the judicial department **was clothed with the power and charged with the duty of enforcing the levy of the tax, the collection thereof and the application of the tax to the payment of the obligation?**

Who can truthfully say, in the light of these provisions, that if, when the petty agent refuses to perform that which the court is authorized to command, the court appoints another agent to perform the act, the court is invading the power and duty of another department?

The United States Court, in such a case, is no more invading the power of another department than when it directs its marshal to perform in execution of its judgment the same act which would be performed by the Sheriff had the cause been in the State court.

I repeat, the above provision for the enforcement of these duties by mandamus does not indicate that a limitation to that remedy was intended in the event it should not be effective. That remedy was inserted only because it was never then contemplated by the Legislature that the writ of mandamus would ever be disobeyed by the agent of a county. No case has been found where a **writ of mandamus has ever been disobeyed by the agent of a county when issued by a State court in Missouri**, or in any other State, except in the State of Washington, where the court found a remedy on much less secure reason than here (see State v. Middle Kittitas Irrigation District, 106 Pacific Reporter, 203.

The provision for mandamus in the above statute of Missouri was, we conceive, strongest possible expression of the plain intent of the Legislature to subject these fiscal agents to the control of the judicial power in order to secure the levy and collection of the tax to the end of payment of these bonds. It was then not considered possible that any minor agent would disobey such a judicial order. It was only after agents of counties, like these in Dallas County, had disobeyed

writs of mandamus issued by the **Federal** courts, when the possibility of disobedience, under like circumstances, of writs to be issued by State courts became apparent. Thereupon, in 1879 the Legislature of the State of Missouri expressly committed to the judicial power, that is, to the **Circuit** Courts of the State, the full determination of the question when taxes (other than the ordinary taxes for the maintenance of the county government) should be levied, and expressly provided that the orders of the Circuit Court should be enforced by **mandamus OR OTHERWISE,** thus, as we contend, removing all doubt that the **enforcement of the mandamus,** when disobeyed, by any and every method which may properly accomplish the act **by the judiciary,** is by the **express authority** of the supreme taxing power of the State, to-wit, the Legislature, **EXPRESSLY AUTHORIZED.** Under these conditions who shall say that the specific performance of the decree is an unwarranted invasion by the judiciary of the powers of another department?

Said sections, as they now appear in the Revised Statutes of Missouri of 1909 as Sections 11416 and 11417, are as follows:

(These sections originally adopted in 1879; see Laws 1879, p. 185.)

> "Section 11416. The following named taxes shall hereafter be assessed, levied and collected in the several counties in this State, and only in the

manner, and not to exceed the rates prescribed by the Constitution and laws of this State, viz: The State tax and the tax necessary to pay the funded or bonded debt of the State, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages and for schools.

"Section 11417. No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The Prosecuting Attorney of any county, upon the request of the County Court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment levy and collection of other taxes than those enumerated and specified in the preceding section, shall present a petition to the **Circuit Court** of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such **Circuit Court** or **judge** thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this State, shall make an order directed to the County Court of such county **commanding** such court to **have** assessed, levied and collected such other tax or taxes, and **shall enforce such order by MANDAMUS OR OTHERWISE.**

"Such order, when so granted, shall be a con-

tinuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the Circuit Court or judge thereof granting the same; provided, that no such order shall be modified, set aside or annulled unless it shall appear to the satisfaction of such Circuit Court or judge thereof that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this State or unless it shall appear to said Circuit Court or judge thereof that the necessity for such other tax or taxes or any part thereof no longer exists."

The above statute, in so far as it prohibits by implication the levy of a tax to pay indebtedness contracted prior to 1879 except in the manner above provided by statute, has (particularly in the requirement that no tax shall be levied except upon the order of the **State** Circuit Judge) been held invalid if limiting the rights of the holders of judgments of the United States courts. See Seibert v. Lewis, 122 U. S. 284, wherein it is held that any limitation or requirement of the taxing power which interferes with the remedy of the creditor accrued prior thereto violates and impairs the obligation of the contract.

The vital part of this statute and its paramount importance in the consideration of the controversy now before this court is that it commits to the judicial

power of the State the power to enforce by **mandamus** or **OTHERWISE** the acts necesary to execution of the taxing power by the performance of such duties as may have been enjoined by the Legislature; expressly waives, by the State, all objection to such execution being an invasion of legislative power, and is, if logical deduction be not entirely abandoned, sufficient authority for the application by the Federal courts, in proper cases, such as this, of remedies **other than mandamus, when mandamus shall have failed.**

This jurisdiction of the United States courts to accomplish full and adequate relief to suitors under its protection is not denied or attempted to be denied by the State of Missouri by any of its departments of sovereignty. The executive does not deny it; the Legislature does not deny it; the judiciary does not deny it. The case of State *ex rel.* Wilson v. Rainey, 74 Mo. 229, was one wherein the County Court of Greene County obyed a mandamus issued by the United States court. Rainey attempted to set up, in a suit to collect from him the proportion of the tax to which his property was subject, that the tax was invalid; that the bonds and coupons upon which the judgment was founded were void. It was therein expressly held that a levy made in pursuance of an order of a United States court could not be questioned; "that a judgment against a county or its legal representatives in a matter of general interest to all of the people thereof, **as one respect-**

ing the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceedings as defendants, but **upon all the citizens thereof, though not made parties defendant by name.**"

> "This, we think, is so, both on principle and authority, for in suits of the character mentioned, the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on as **a tax payer to contribute his proportion to liquidate the demands which a judgment may establish.**"

It is of no consequence whether the particular tax in controversy here be mentioned in this later authority by the Legislature to the judiciary to enforce performance of duties with relation to taxation by "mandamus or **otherwise,**" for, petitioner claims, the power to enforce specific performance of duties connected with taxation is conferred upon the judiciary of the State by the use of the "writ of mandmus, or otherwise"—the object being to secure specific performance, and there can, therefore, be no objection made that any writ issued by the United States court which may be necessary for the exercise of its jurisdiction is not "agreeable to the usages and principles of law" if similar action in like causes is had in the State courts.

IV.

The language of Sec. 262 of the Judicial Code is "agreeable to the usages and **principles** of law." The word law is here used in its broad sense, including law and equity, and

> "The courts of the United States are not restricted to the kind of processes used in the State courts or bound to conform themselves thereto in all respects, but have the authority to alter the process in such manner as may be deemed expedient and to so adapt it that its effect and operation may be effectual."
>
> Hills v. Hoover, 220 U. S. 335-7.

That no limitation to common law writs was intended, and that "the authority to carry into complete effect the judgments of the courts necessarily results, by implication, from the power to ordain and establish such courts," is held in Bank v. Halstead, 10 Wheat. 53.

V.

> "When the Federal Court acquires jurisdiction of the case and facts are shown which, under the State law, warrant the issuance of an injunction, such relief may be awarded whether the facts are such as ordinarily warrant such relief in Federal courts, or not."
>
> Sec. 375, Eq. Remedies, Vol. 1, Pomeroy's Eq. Jurisprudence;
>
> Holland v. Challen, 110 U. S. 24;
>
> Davis v. Gray, 16 Wall, 203;
>
> Chicot Co. v. Sherwood, 148 U. S., *l. c.* 534.

VI.

The highest court of the State has held that a municipal corporation is, when the rights of the creditor of the corporation are involved, as subject to the control of the judiciary as would be private business corporations.

State *ex rel.* v. Gates, 190 Mo. 540.

VII.

The State is not interfered with by this proceeding. The interferers with the power of the State are the agents of the municipality who are defying the State as well as the United States.

Virginia Coupon cases, 114 U. S., *l. c.* 295 and 298.

VIII.

The express power to control the action of and appoint substitutes for all of these agents was conferred by the statutes in force at the time the debt was created, upon the judiciary. Such statutes are as follows:

The County Court was a mere fiscal board for the transaction of the business affairs of the municipality. Over it the Circuit Courts of the State exercise superintending control by express provision of the Constitution of the State (Sec. 23, Article VI, Constitution, 1875). The Circuit Court exercises original concurrent jurisdiction over ordinary county affairs. (Givens v. Daviess Co., 107 Mo. 608.) The assessment has been

made, but even as to the office of an assessor, the appointment of a substitute for him is permitted by the laws of Missouri. The Sheriff was ex-officio Collector of the Revenue (Sec. 1, Chap. 135, R. S. Mo., 1855, p. 1338). A substitute might be appointed for this officer by the judiciary. Sec. 37, Chap. 47, R. S. 1855, as well as Sec. 18, Chap. 133, G. S. 1865, provides: "Where there is no Sheriff or other ministerial officer qualified to act, or where they are interested or prejudiced, the Court may appoint one or more persons to execute their process and perform any other duty of such officer. * * *" The Court, in Missouri, may appoint a clerk temporarily. (State *ex rel.* Sheppard, 192 Mo. 509 and 517).

IX.

The power to enforce special taxes against a special taxing district when the tax was authorized by the legislative power, at the suit of a creditor, existed in equity, and equitable proceedings were applied under ancient chancery practice, although certain text-books have erroneously stated the contrary.

Sec. 519, Story's Equity Jurisprudence, page 539, Vol. 1.

Blackbourne v. Webster (1731), Peere Williams Reports, 2.

In Precedents In Chancery, at page 43, it is said:

"There are instances of ancient date in which

the court of chancery has decreed the payment of money to be levied by a parish rate." (See James v. Rich, Feb. 26th year, Chas. II), Year Cases, 1st.

See:

The Attorney General v. Heelis, 2 Simons and Stuart's Reports, Cases in Chancery, p. 67.
Ex rel. Wm. Izard v. Brown *et al.*, 1 Swanston's Chancery Reports.
Stanley Co. v. Coler, 190 U. S. 437;
New Orleans v. Warner, 175 U. S. 120.

X.

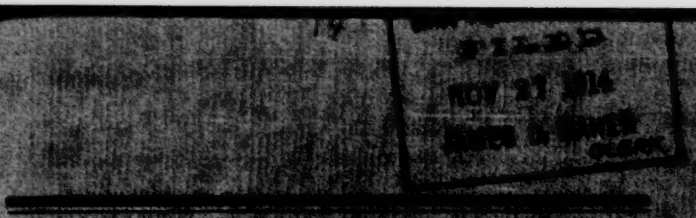
The Supreme Court of the United States having upheld a similar proceeding in the case of Supervisors v. Rogers, 7th Wallace 175, and having thereafter distinguished such case and expressly upheld the same upon the express ground that the Iowa code permitted such a proceeding, the materiality of the laws of Missouri to a proper consideration of the questions involved herein, becomes apparent. In Supervisors v. Rogers, the marshal of the United States Court was appointed to perform certain duties to levy and collect a tax, after the writ of mandamus had been disobeyed, and the appointment was upheld upon the ground that the general code of procedure of Iowa provided that when an act was ordered to be performed and such order was disobeyed the Court might appoint another to perform. In that case it appears there was no special application shown of such statute of Iowa to matters of revenue

and taxation. Such proceeding must have been upheld upon the general proposition that the laws of Iowa, permitting a substitute to be appointed to perform, after a lawful order had been disobeyed, in ordinary cases between ordinary suitors, a similar proceeding by the United States court was "agreeable to the usages and principles of law." The case here is much stronger, for, as shown, the judiciary of the State is specially authorized in matters of revenue and taxation to enforce performance by "mandamus or otherwise," and there is no method "otherwise" than to appoint a substitute to perform, when the mandamus has been disobeyed.

Supervisors v. Rogers, 7th Wallace 175.

Therefore, the laws and the construction thereof by the highest courts of the State of Missouri specially permitting the enforcement of duties connected with contracts for taxation and the specific performance of the acts necessary by "mandamus or otherwise", are compelling authority for the application in this case of ordinary equity powers to the petty officials who are acting outside of their official capacity in defiance both of the laws of the State and of the Constitution and laws of the United States.

HARRY J. CANTWELL,
Counsel for Petitioner.



IN THE

SUPREME COURT OF THE UNITED STATES.

DAVID YOST, [illegible]

vs. No. [illegible]

DALLAS COUNTY.

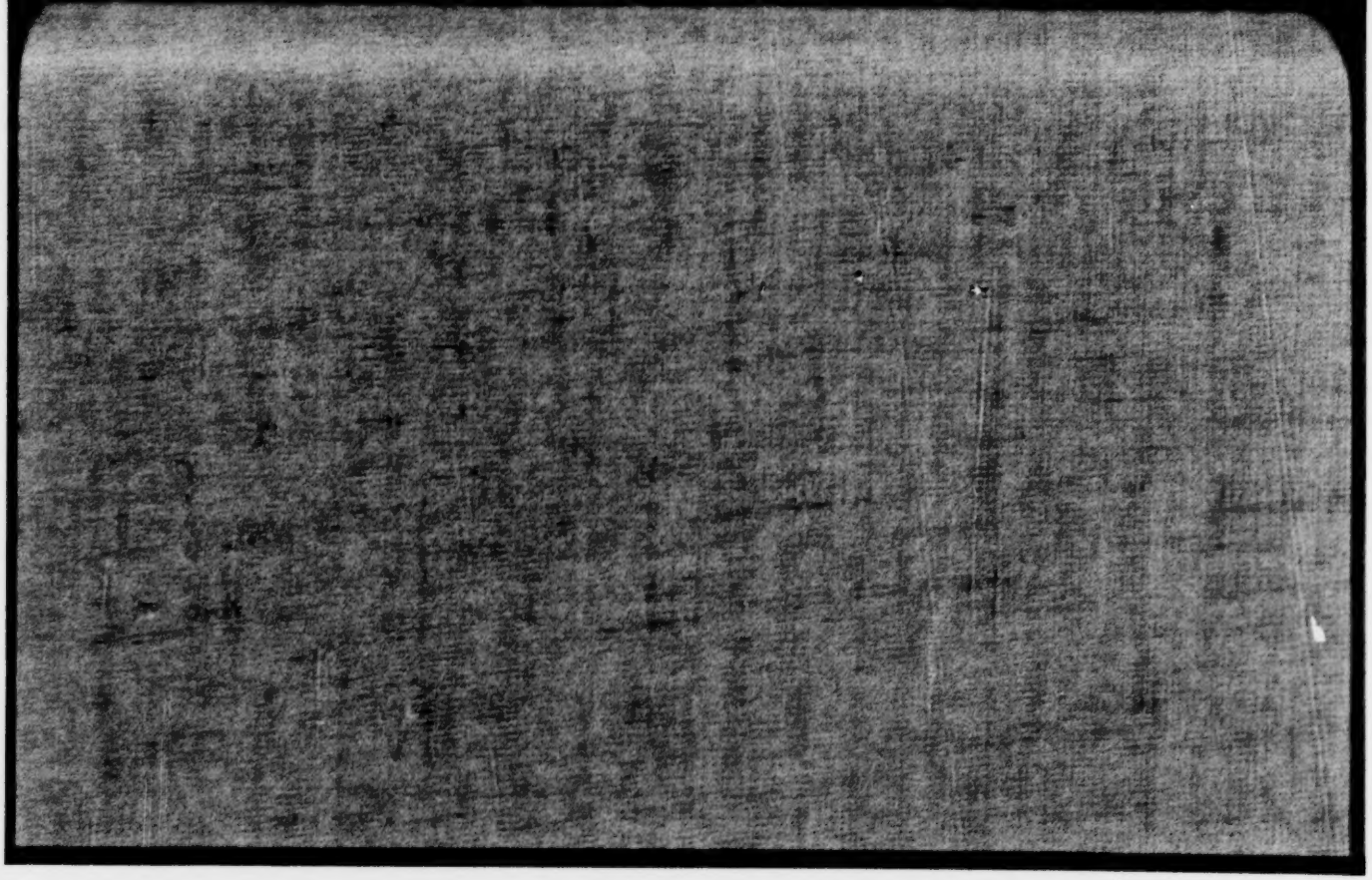
ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DAVID YOST, PLAINTIFF.

ASHLEY J. CANTWELL,

Solicitor for David Yost, Plaintiff.

St. Louis Law Printing Co., Printers' Bldg., North and Fourth. Cent. 4000.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

DAVID YOST

vs.

DALLAS COUNTY.

No. 604.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DAVID YOST, PLAINTIFF.

STATEMENT.

This case, pending in the Eighth Circuit Court of Appeals, is here for the determination of two questions, as certified by the judges thereof, under the Act of March 2d, 1907.

The statement of facts in the certificate, preceding the propositions of law certified, contains every matter which may be involved in the controversy, except the fact that plaintiff's petition, in addition to the other

elements of a bill in equity contains necessary facts to constitute a creditors' bill in equity—the suit being brought by plaintiff for the benefit of himself and other judgment creditors to secure *pro rata* distribution of a common fund when collected. This fact, however, is not deemed to be a vital factor, as the motion for *certiorari* has been denied, and this brief is, therefore, confined to the questions of law involved in the certificate. The facts are tersely stated by the certificate as follows:

The facts:

> "The United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Paul, Minnesota, on the third day of August, A. D. 1914, certifies that the record in the case above entitled, which is pending in this court upon appeal for review of the decree in favor of the appellee, is an action in equity, brought by the appellant as a judgment creditor of appellee, to have a commissioner appointed to levy and collect the special tax on the taxable property of said appellee, authorized by the laws of the State of Missouri, the officers of said county refusing to discharge their duties in that respect, although repeatedly commanded to do so by writs of *mandamus* issued by the court in which the judgment was rendered, and served at different times upon the proper officers of said county. The plaintiff, who is appellant herein, in his complaint alleges that he is a citizen of the State of Pennsylvania, and the defendant, Dallas County, is a municipal corporation of the State of Missouri; that he is the owner of record of a certain final judgment against the defendant for over a million dollars, recovered on the law side of the court in which this bill was filed, on October

7, 1908, with interest thereon from that date. That said judgment was based upon judgments theretofore rendered by said court; that the original judgments were founded upon bonds, issued by the county in the year 1871, under an Act of the General Assembly of the State of Missouri, entitled 'An Act to incorporate the Laclede & Fort Scott Railroad,' approved January 11, 1860. This act, so far as it is necessary for the determination of the questions certified herein, is as follows:

"'It shall be lawful for the County Court of any county in the state to subscribe to the stock of said company, or invest its 3 per cent bonds, or any other improvement fund belonging to the county, as stock in said road; and for the stock subscribed in behalf of the county may issue the bonds of the county to raise funds to pay for the same, and to take proper steps to protect the interests of the county; may appoint an agent to represent the county, vote for and receive dividends; any incorporated city, town or company may subscribe to the stock in said railroad company, and appoint an agent to represent its interests, give its votes, and receive dividends, and may take proper steps to guard and protect the interests of said city, town or company.'

"That under the laws of the State of Missouri in force at the time of the issuance of these bonds, which were for the sum of $235,000, it was made the duty of the proper county officers to levy and collect annually a tax equal to 30 per centum of the amount of bonds issued; that this duty to levy and collect that tax, or any part of it, has never been performed by the county officers, and that there is no money in the county treasury which can be applied to the payment of this judgment, or any part thereof; that the property of said county

is exempt from seizure and sale under execution; that none of these bonds, or any part of the interest thereon, has ever been paid, and that the judgment of the plaintiff was duly recovered on said bonds, and the interest coupons attached thereto, the defense of the county, that such bonds were illegally issued, having been overruled by the Court. That ever since the recovery of this, and the former judgments against the county, efforts have been made by the owners of said judgments to compel the levy of a tax to pay them; that writs of *mandamus* have been repeatedly issued by the Court commanding the officers of Dallas County, Missouri, to levy a tax to pay said judgments; that the marshals of the United States have been unable, except at times, and then only after long and vexatious delays, to secure service of process on said officers, during which time the said officers would, and did secrete themselves and evade the marshals of the United States Court in their efforts to serve the said *mandamus;* that said writs of *mandamus* have in no case been obeyed, nor good cause shown for disobedience thereto; on the contrary they have been treated with open and flagrant contempt; the official power of the United States has been defied. That when attachments have been issued for contempt for the failure of said officers to obey said writs, they would, and did, secrete themselves, abscond from the county and state, and when finally apprehended, obtain their release by promises to secure a compromise of the litigation, and upon their failure to perform their promise would evade recapture until their successors in office were installed, when the whole farcical proceedings would be compelled to be rebegun against their successors in office, with like fruitless and farcical results.

That the plaintiff has within late years instituted a number of proceedings against all of the agents of said Dallas County, without effective results. That on November 29, 1911, at plaintiff's expense, a writ of *mandamus* was issued to compel the then officers and agents of defendant, to levy a special tax for the sum of $70,500, being 30 per cent of the amount of bonds issued; that the county and its officers were duly served with process therein, and that on May 1, 1912, after a full hearing of counsel, a peremptory writ of *mandamus* was ordered, commanding the officers of said defendant to levy and collect a special tax for the sum of $70,500 upon the taxable property of said county, for the purpose of paying the same on said judgments; that when said officers met for the purpose of levying said taxes they refused to obey the said peremptory writ of *mandamus*, and failed to levy such tax; that writs of attachment were thereafter issued for two justices of said County Court, who constituted a majority thereof, and who had refused to obey said writ, and although the marshals of this Court made repeated efforts, and spent many days searching for them, they have been unable to apprehend them by reason of the fact that they concealed themselves or absconded from the county and state; that meanwhile the terms of said officers, so in contempt, have expired; that an *alias* peremptory writ of *mandamus* was issued at the expense of this plaintiff on April 9, 1913, but owing to the fact that said officers and agents concealed themselves the said writ remains unserved, although through no fault of the plaintiff; that to sue out additional writs of *mandamus* each year would be expensive, and would require a multiplicity of suits, delays, and with the result that they would be disobeyed as they have in the past. That

the officers of the county charged by law with the duty of the levy and collection of taxes are:

"(*a*) Three Justices of the Peace.

"(*b*) The County Clerk, whose duty it is to extend them on the tax books.

"(*c*) The Collector, whose duty it is to collect them.

"(*d*) The County Treasurer, whose duty it is to receive taxes uncollected and disburse them to the proper officers;

that all the acts required to be done to collect the $70,500, to which the plaintiff is now entitled under his judgment and writs of *mandamus*, are clerical and ministerial, and no act of discretion whatever is required to accomplish this purpose. Sections 30 and 31, page 427 of the Revised Statutes of Missouri of 1857, which were in force when the bonds were issued, and which became a part of the contract between the parties, provided that the County Court should levy to pay such bonds a special tax not exceeding 30 per cent in any one year of the $235,000, which is $70,500, that it should hold and apply this tax to the payment of such bonds and to no other purpose, and that the last previous assessment should constitute the basis of the assessment or levy. The last previous assessment has been made and recorded, and the only acts requisite to collect the $70,500 are the mere clerical or ministerial acts of apportioning it among the taxables in the county on the basis of that assessment, and collecting it of the parties and properties liable.

"It is therefore prayed that the Court, sitting as a court of equity, appoint a commissioner for the purpose of levying and collecting and paying over the taxes as prescribed by the laws of the State of Missouri.

"The defendant filed a motion to dismiss the bill upon the grounds:

"1. The facts alleged are insufficient to state a valid case in equity.

"2. Plaintiff has a plain, adequate and complete remedy at law.

"3. This Court possesses no power or authority to levy or collect taxes for the satisfaction of the judgment mentioned in plaintiff's bill; neither has it authority to appoint or designate any other person for that purpose.

"4. The granting of the relief prayed for by plaintiff would be an invasion of the constitutional and sovereign rights of the State of Missouri and its citizens.

"5. To levy and collect the tax prayed for in plaintiff's bill would tend to deprive the State of Missouri of the right it possesses as a sovereign State, secured to it by the Federal Constitution, and would destroy the republican form of government guaranteed to it by that instrument.

"The motion to dismiss was sustained by the trial court, and from that decree this appeal was taken.

"And the United States Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to it in the cause above entitled; that the decision of these questions is indispensable to the determination of this cause, and to the end that the cause may be properly determined and disposed of, it desires the instruction of the Supreme Court of the United States upon the following questions."

The propositions of laws certified:

"1. Has a District Court of the United States, sitting as a court of equity, jurisdiction of such a cause?

"2. When a judgment has been recovered on the law side of a District Court of the United States of competent jurisdiction, against a county of the State of Missouri, on its bonds issued by authority of law, and the laws of that state in force at the time the bonds were issued authorized such county to levy and collect taxes to pay such bonds, and the county has no funds in its treasury which can be applied to the payment of the judgment, and its property is, under the laws of the state, exempt from seizure and sale under execution; when the officers charged by the laws of the state with the duty to levy and collect taxes to pay such judgment refuse so to do, when the court in which such judgment was rendered has a number of times issued writs of *mandamus* commanding such officials to levy the taxes which they were authorized and which it was their duty to levy to pay such judgment, but these officials have, when possible, evaded service of these writs, and when served have willfully and defiantly refused to obey the writs of *mandamus*, and the fact has been conclusively demonstrated by the proceedings at law that the plaintiff is utterly remediless at law by *mandamus* or otherwise for the failure of the county to pay, and the refusal of the officers of the county to discharge their duty to levy and collect taxes and therewith to pay his judgment; and when the last previous assessment was made which, by the statute in force at the time the contract was made, was authorized and made the basis of the levy of the amount to which the plaintiff is now entitled under his judgment and writs of *mandamus* so that no act of discretion is required to levy and collect it, but only the clerical or ministerial acts of apportioning the amount among the assessed values of the taxables specified in the last

previous assessment, placing it on the tax books and collecting it of the persons and property liable therefor, has the Federal Court of the District in which the judgment was rendered, and the futile writs of *mandamus* issued and, when possible, served, the jurisdiction and authority in equity to appoint a commissioner, receiver or other officer to make the apportionment and collect the amounts which the owner of the judgment is entitled to have collected from the parties and properties liable therefor."

THE QUESTIONS INVOLVED.

I.

In the first proposition, as certified, is involved the question of jurisdiction in equity generally, without regard to form of relief to be awarded, of the United States District Courts. Plaintiff contends that this question should be answered in the affirmative, because it clearly appears that this is a controversy between citizens of different states, over which the Constitution of the United States has extended judicial power, and the jurisdiction over which has been conferred by Congress upon the district courts. Fundamental and usual grounds of equity jurisdiction being alleged and admitted, jurisdiction in equity cannot be denied.

II.

The second proposition involves the question of means of enforcement of such jurisdiction. Plaintiff contends that the jurisdiction of the District Court to render the judgment, and to issue a special *mandamus*, or mandatory order, directing the specific performance of certain acts to the end of payment of the judgment

being conceded, when such mandatory order fails of its purpose only because of the refusal of the agents of the defendant to obey the order, the power and jurisdiction of the Court does not end and determine. The power and jurisdiction of the Court is not dependent upon the will of the agents of the defendant. The power of the Court to employ other and more effective and necessary means to the end of securing execution is limited **only** by the determination of whether such other means of securing execution and enforcing jurisdiction are "agreeable to the principles and usages of law". The plaintiff contends that the highest judicial authority of the State of Missouri considers this defendant as occupying to its creditors the same position as a private corporation would occupy in its contractual relations, and that the Legislature of the State of Missouri has provided such remedies as is here proposed to be employed, for contumacious private corporations; that the Legislature of Missouri has specially conferred upon the judiciary the power to compel the specific performance of duties imposed upon the agents of counties to the end of payment of this obligation, that in similar cases the method of compelling performance is not limited to the issuance of a writ of *mandamus*, but that courts in Missouri may, by statute, enforce the performance of all duties to the end of payment of this obligation by "*mandamus* **or otherwise;**" in addition, that equity courts (except when limited by legislation, and they are not so limited in this case) anciently employed such means as are proposed in the second question certified, under like circumstances and when necessary to enforce jurisdiction. Therefore, the means proposed are "agreeable to the

principles and usages of law", and the second question certified should be answered in the affirmative.

These questions were summed up, and the errors of the District Court in dismissing the bill and the cause, were fully discussed in the Court of Appeals upon the following

Specifications of the Errors Relied Upon:

"1st. Because the court erred in sustaining the motion to dismiss.

"2nd. Because the court erred in dismissing the petition and the cause.

"3rd. Because the court erred in holding that the petition did not state a cause of action in equity.

"4th. Because the court erred in holding that it was without power or jurisdiction to afford any equitable relief.

"5th. Because the court erred in holding that it was without jurisdiction to administer the relief specifically prayed.

"6th. Because the court erred in holding that it was without power or jurisdiction to enforce its own judgments.

"7th. Because the court erred in holding that the relief prayed for would constitute an invasion of the powers of other departments of government.

"8th. Because the court erred in holding that the United States courts are powerless to enforce their lawful mandates against the will of the agents of a debtor municipality.

"9th. Because the court erred in holding that the agents of a municipality might, by violating their oaths of office, effectively impair and destroy the obligations of contracts.

"10th. Because the court erred in holding that further permission or authority was necessary from the Legislature of Missouri before the United States court could enforce its lawful jurisdiction in the premises.

"11th. Because the court erroneously held that the power of the United States court to enforce its judgments against municipalities in Missouri was limited to the issuance of a *mandamus* and that such power did not extend to the enforcement of the order.

"12th. Because the decree herein denies to citizens of other states rights which they might, under the laws of Missouri, enjoy in the state courts, and because the decree denies the plaintiff the equal protection of the laws.

"13th. Because the decree herein impairs the obligation of contracts.

"14th. Because the court erroneously held that this cause was, in effect, against a state, whereas no power of any governmental department of the State of Missouri would be invaded by the granting of the relief asked.

"15th. Because the court erred in holding that the exercise of the powers prayed to be exercised would constitute an unwarranted exercise of judicial power, whereas power to perform such acts has been conferred upon the judicial department of the State of Missouri by the State of Missouri, and the courts of the United States are entitled to exercise all such judicial powers in the exercise of jurisdiction once lawfully acquired."

BRIEF OF ARGUMENT AND STATEMENT OF POINTS OF LAW AND AUTHORITIES.

I.

"The courts of the United States are bound to proceed to judgment **and to afford redress to suitors before them in every case to which their jurisdiction extends.** They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

Chicot Co. v. Sherwood, 148 U. S., *l. c.* 534.

II.

The means to be employed by the United States courts, in the enforcement of their lawful jurisdiction, are limited only by the determination of whether such means are necessary, and agreeable to the principles and usages of law.

Sec. 262, Judicial Code;
Hills v. Hoover, 220 U. S. 335-7;
Holland v. Challen, 110 U. S. 24;
Davis v. Gray, 16 Wallace, 203;
Chicot Co. v. Sherwood, 148 U. S., *l. c.* 534.

III.

Counties and other municipal corporations, when acting for the particular advantage of the particular corporation, **and not from considerations connected with the government of the state at large,** are to be regarded as private corporations. There is no qualification of this rule when the creation of the debt and of the means to pay it are specially authorized by the Legislature of the State.

Murray v. Charleston, 96 U. S. 445;
State *ex rel.* Gates, 190 Mo. 540, *l. c.* 558-560;

State *ex rel.* v. County Court, 128 Mo. 427, *l. c.* 438;

Lincoln Co. v. Luning, 133 U. S. 529, *l. c.* 531.

IV.

There is no distinction between counties and cities or towns as regards their liability for obligations created in their business capacity, or in the method of enforcement of the obligations.

Laramie County v. Albany County, 92 U. S. 307 (*l. c.* 2nd par. 311);

Mount Pleasant v. Beckwith, 100 U. S., *l. c.* 524-525;

Lincoln Co. v. Luning, 133 U. S., *l. c.* 531.

V.

In the event of disobedience of any peremptory writ of *mandamus* issued to a private corporation the court may "appoint a receiver and direct that he take possession of and preserve, control and manage all the property, rights, privileges, franchises and business of such corporation, and **that he proceed to do the act or acts required to be done by such peremptory writ of mandamus.**"

Sec. 3012, Revised Statutes of Missouri, 1909.

VI.

The special tax imposed by the Legislature of the State of Missouri upon the property in Dallas County is a special charge, analogous to internal improvement charges. It bears no relation to ordinary taxes for the maintenance of local government. The creation of the debt by the authority of the legislature, the provisions of the legislative act definitely fixing the property upon

which it should be charged, and requiring the enforcement of the charge for the payment of the debt, created a charge against definite specific property. Such charges are not taxes in the ordinary sense. As to special internal improvement taxes chargeable against particular districts, which this essentially is, the Supreme Court of Missouri has held that the limitations and requirements even of the state constitution requiring certain formalities by certain persons in order to create a **"tax"**, are not applicable to such special assessments or charges.

Farrar v. City of St. Louis, 80 Mo. 379;
Construction Co. v. Shovel Co., 211 Mo., *l. c.* 532;
Ray Co. v. Bentley, 49 Mo. 236;
Dickason v. County Court, 128 Mo. 427 (438).

VII.

The charge here is a charge imposed **by law**. It is made fixed, definite and certain as to amount, and the property upon which it is to be charged by the law of the state, and the judgment of the court. It does not require, nor is it dependent upon the sanction of the agents of the defendant. The persons upon the assessment list are charged by the judgment with their proportion of the debt ascertained. In such a case the language of the Court in King v. U. S., 99 U. S., *l. c.* 233, although that referred to a national tax, is pertinent, to-wit: "The facts being established on which the tax rested, the **law made** the assessment (levy in this case) and an action of debt could be maintained to recover it, though **no officer had made** an assessment."

King v. United States, 99 U. S., *l. c.* 233;
Savings Bank v. U. S., 19 Wall. 227-240;

Meriwether v. Muhlenburg Ct., 120 U. S., *l. c.* 357;
Thompson v. United States, 103 U. S. 484;
Supervisors v. Rogers, 7 Wallace 175.

VIII.

There being no act of discretion to be performed by the agents of the defendant, the acts necessary to enforce the charge against definite property being acts commanded by the sovereign power of the State, no good reason can be given why the same remedy should not be applied to these agents of the county as would be applied if the county were a private corporation.

IX.

But the right to secure the specific performance of the acts in question against these particular agents and in this particular instance, rests upon stronger grounds than any reasoning that the obligations of a county are enforcible in the same manner as would be the obligations of a private corporation, for the sovereign power of the State of Missouri has specially conferred upon the judiciary **the duty of compelling the specific performance** of every act necessary to payment of the judgment in this case.

P. 427, R. S. Mo. 1855;
P. 438, Vol. I, R. S. Mo. 1855;
P. 306, Wagner's Mo. Stat. 1870, see appendix.

And gave the judiciary express power to dispense with the official action of any particular individual officer in the performance of any and every act which might be necessary to the accomplishment of payment

of these bonds by the following statutes printed at length in the appendix hereto:

Sec. 8, Chap. 47, R. S. 1855, p. 533;
Sec. 21, Art. VI, Constitution of 1865;
Sec. 23, Art. VI, Constitution of 1875;
Sec. 16, Chap. 135, R. S. Mo. 1855, p. 1329;
Sec. 7, Chap. 12, G. S. Mo. 1865, p. 99;
Sec. 1, Chap. 135, R. S. Mo. 1855, p. 1338;
Sec. 37, Chap. 47, R. S. 1855;
Sec. 18, Chap. 133, G. S. 1865.

The County Court is not even a necessary factor in the allowance of ordinary demands against the county in Missouri, so completely is that body under the judicial control.

Givens v. Daviess Co., 107 Mo. 608.

X.

The whole question of levying taxes and of raising revenues is, in Missouri, under the control of the judiciary. In the enforcement of its orders the judicial power of the State may now, by express provision of the Missouri Statutes, compel performance of any duties relative to taxation by "*mandamus* or otherwise".

Sections 11416 and 11417, R. S. Mo. 1909, printed in full in appendix.

The specific performance of the acts necessary to secure payment being required by the State of Missouri, the judiciary of the state not being limited in the powers it may exercise to secure specific performance, there being no discretion in the agent as to performance and the judiciary of the State of Missouri being expressly permitted in similar cases to secure specific performance by the substitution of another to per-

form—when the agent first commanded refuses to perform—the United States courts may exercise the same powers, because such powers are "agreeable to the usages and principles of law."

Davis v. Gray, 16 Wall. 203;
Holland v. Challen, 110 U. S. 24;
Louisiana v. Jumel, 107 U. S., *l. c.* 728;
Supervisors v. Rogers, 7th Wall. 175.

XI.

This being a case in which equity has original jurisdiction, any of the usual equitable remedies may be applied, and Equity Rule No. 8 is applicable.

Walla Walla v. Walla Walla Water Co., 172 U. S. 12;
Davis v. Corbin, 112 U. S. 40;
Gibson v. Shufeldt, 122 U. S. 38;
Oelrich v. Spain, 15 Wall. 211;
Hills v. Hoover, 220 U. S. 335-7;
May v. May, 167 U. S. 310;
Boyce v. Grundy, 3 Peters 210 (*l. c.* 213);
Clark v. Wooster, 119 U. S. 326;
Street's Federal Practice, Sec. 52;
Pendleton v. Perkins, 49 Mo. 565 (*l. c.* 567).

XII.

The power of equity courts, in a case wherein the court has, under the Federal Constitution, jurisdiction because of diverse citizenship, to protect the rights of a suitor, when usual grounds for equitable relief are set up, is now undoubted—even though there may thereby be involved control of matters of revenue and taxation. The exercise of the equity powers cannot be, and are not, confined to cases where debtors seek relief from the imposition of an unlawful tax for creditors who are,

by contract, entitled to the proceeds of a lawful tax are as properly entitled to the exercise of equitable relief. This exercise of equitable powers can be denied only when there is a legislative provision denying it. In the case at bar there is no legislative provision denying it. On the contrary there are legislative provisions of the State of Missouri requiring its exercise. The Legislature of Missouri has placed all of the agents of these municipalities under the supervision and control of the judiciary. The highest judicial authority of the State asserts the power of equity courts to control taxation, at the private suit of any one interested, as part of its general equity jurisdiction.

Newmeyer *et al.* v. Mo. & Miss. R. R. Co. *et al.*, 52 Mo. 81;

Rolston v. Mo. Fund Commissioners, 120 U. S. *l. c.* 411;

Crampton v. Zabriskee, 101 U. S. 609;

Secs. 1488-9, Dillon on Municipal Corporations;

Davis v. Corbin, 112 U. S. 40;

Gibson v. Shufeldt, 122 U. S., *l. c.* 38;

Sec. 519, Story's Equity Jurisprudence, page 539, Vol. I;

Blackbourne v. Webster (1731), 2 Piere Williams 632;

The Attorney-General v. Heelis, 2 Simons and Stuart's Reports, Cases in Chancery, p. 67;

Ex rel. Wm. Izard v. Brown *et al.*, 1 Swanston's Chancery Reports 265;

Stanley Co. v. Coler, 190 U. S. 437;

New Orleans v. Warner, 175 U. S. 120;

XIII.

Mandamus is but one of the means of securing the specific performance of an act which the suitor has the right to have performed. It is not an end; it is but one of the means of securing specific performance.

Antoni v. Greenhow, 107 U. S. 781;
Davenport v. Dodge County, 105 U. S. 237 (*l. c.* 243).

Commenting upon a Missouri statute in Louisiana (a town in Missouri) v. U. S., 103 U. S., *l. c.* 292, this Court says:

> * * * "In such a case permission is given to the Court in which the judgment has been rendered for special relief."

XIV.

"Equity regards that as done which should be done." The right to the levy being fixed by the sovereign power of the State, and so determined by the Court, the agents of the debtors can have no will contrary to the will of the State. The debt is liquidated and certain; the property upon which it is a charge, the *pro rata* which each owner should pay is already definitely fixed by the sovereign power of the State, and by judicial determination. The Court is asked to make effective that which it has already decreed—which it had the unquestioned right to decree.

State *ex rel.* v. County Court, 128 Mo. 427, *l. c.* 438;
County of Greene v. Daniel, 102 U. S., *l. c.* 194;
Caster Co. v. Sinton, 120 U. S. 517;
Hawley v. Fairbanks, 108 U. S. 543.

XV.

The distinction between compelling by *mandamus* or otherwise a sovereign State to perform an act against its express will, and compelling, by *mandamus* (or by substitute performance, if *mandamus* be not obeyed), the performance of a ministerial act by the mere agent of a defendant debtor, when the State expressly requires the act to be done, and when the State expressly authorizes the judiciary to employ other means, in addition to *mandamus*, to secure performance, is a vital distinction. This case is therein distinguishable from every other case that has come to the Supreme Court, except

Supervisors v. Rogers, 7 Wallace 175,

and

Stansell v. Levee Board of Mississippi District No. 1, 13 Fed. Rep. 846, *l. c.* 851;

where the Court below exercised exactly the same powers as are here sought to be invoked. The opinion of the Supreme Court of the United States, however, does not comment upon the decree below, but the decree below stood and was enforced. See Russell v. Stansell, 105 U. S. 303.

XVI.

In the case at bar, it is not the State of Missouri, but the mere agents of a municipal corporation—which under the decision of the state courts and of this Court, enjoy no more immunity from control than if they were the agents of a private corporation, who attempt to defeat the jurisdiction of the Court, to paralyze the judicial arm of the United States by violating the laws of the state.

The State is not interfered with by the proceedings sought herein.

The powers of the State, as well as the powers of the United States, are denied and defied by the agents of this corporation, now in contempt of both.

Virginia Coupon Cases, 114 U. S., *l. c.* 295, 298.

XVII.

Every case decided by the Supreme Court of the United States, which may be cited in denial of the award of relief to the plaintiff herein is distinguishable from the case at bar, in one, or more, of the following particulars. That in such cases:

(*a*) No ordinary ground of equity jurisdiction was stated.

(*b*) That the legal remedies had not first been pursued.

(*c*) That the State had not authorized the tax, or the means of enforcement.

(*d*) That there was discretion to be exercised with which the judiciary was not specially authorized to interfere.

All of these objections are removed in this case, and Supervisors v. Rogers, 7 Wall. 175, is a precedent in point.

See cases reviewed and distinguished in body of argument

ARGUMENT.

Plaintiff conceives that the first proposition certified requires little citation of authority and no argument to show that it must be answered in the affirmative. The cases involving some of the points stated in the second question are so many, and in them are so many complicated questions, in the decision of which the expression of judicial opinion has been so voluminous, that a constant regard to the actual points involved in each is required to prevent the thought from being diverted from the plain issue in the case at bar.

The power of the Court to specially order the performance of definite specific duties by the agents of the municipal corporation to the end of payment to the judgment creditor by *mandamus* is conceded. Those orders were not appealed from, and under the law and the facts of this case an appeal could not have been sustained. **If the agents of the municipality had obeyed** these mandatory orders, the creditors would have received payment, execution of the judgment would have been accomplished, the jurisdiction, the dignity and the power of the Court would have been vindicated.

But the agents of the municipality contemptuously refuse to obey the orders of the Court (thereby, also, refusing to obey the mandate of the sovereign state which the Court but followed). The issue then: Is the jurisdiction and power of the Court ended by this refusal of the agent of the municipality, in which refusal he violates his oath of office? Is the power and jurisdiction of the United States dependent upon his will? Unless the second proposition certified be an-

swered in the affirmative, then it is apparent that the effect of the contempt of these agents is to finally destroy the rights of the creditor, and to nullify and destroy within the precincts of Dallas County, Missouri, at least, and within the precincts of such counties as choose to follow their example, both the power of the United States and the power of the State of Missouri as well.

Respondent respectfully submits that a *mandamus* specifically requiring the exact performance of an act can only be issued when there is no discretion whatever in the agent, when the law of the State unconditionally requires the exact performances, that under such circumstances, if the agent, who is not an officer of the State, refuses to perform, performance may be accomplished by a substitute to be appointed by the Court in a case where usual equitable grounds are set up, and that under such circumstances it is the law of the State, and not the act of the individual which accomplishes performance.

What Remedies May Lawfully Be Employed?

Plaintiff respectfully submits that any or all equitable remedies ordinarily employed between ordinary litigants that are necessary to accomplish performance to the end of enforcement of the contract rights of the creditor and to enforce the jurisdiction of the court, may be employed, because in such a case the United States Court is limited only by the question of whether or not such remedy is "agreeable to the usages and principles of law," and any necessary remedy which the State permits or applies, in similar cases, conclusively establishes that such remedy is "agreeable to

the principles and usages of law". Here a debt was expressly authorized by the Legislature, and lawfully created by the issuance of the bonds of the county. The property chargeable with the payment was definitely fixed, and the duty of charging such property with the liability and of collecting and paying the creditor was imposed by the Legislature. The Legislature further conferred upon the judiciary the power and duty of compelling the performance of all acts necessary to attain the ultimate end of payment to the creditor. This was not only a contract, but it was a trust, a trust within both modern and ancient equity jurisdiction. (Sec. 519, Vol. I, Story's Equity Jurisprudence; New Orleans v. Warner, 175 U. S. 132; Roberts v. N. P. R. R. Co., 158 U. S., *l. c.* 17; Case v. Beauregard, 101 U. S., *l. c.* 688; Curran v. State of Ark., 15 How. 304; Hawley v. Fairbanks, 108 U. S. 543; State *ex rel.* v. Co. Court, 128 Mo., *l. c.* 444; Ray Co. v. Bentley, 49 Mo. 236.)

When the Court in the exercise of its unquestioned power and jurisdiction orders specific performance by the agents of the municipality—which order could not have been issued unless the law required it—the agents of the municipality **simply refuse** to perform! Would there be any doubt about the power to resort to all equitable remedies, to-wit, performance by substitutes, sequestration of the property chargeable with the lien, the appointment of receivers, masters, marshals or commissioners, who would apportion the debt against the property, by law chargeable with it, and the enforcement of the proportionate charge against each piece of property by supplementary proceedings, if this were a private corporation, or unless the fear is raised that such a proceeding would, in some way,

interfere with the political powers of the State! That such a proceeding in this case does not interfere with the powers of the State, but, on the contrary, is a vindication of the power of the State while sustaining the powers granted to the United States by the Constitution, appears from the following considerations:

1st. The charge or tax imposed against this property bears no analogy to the ordinary taxes for maintaining the State or local government. While the tax to be imposed here was a tax for a public use, yet it was also a charge for the special benefit of the owners of the property as well. The owners of property in Dallas County became the owners of the railroad to be built, they acquired the capital stock of the railroad for the bonds and the proceeds of the sale of the bonds was expended on the building of the railroad. This charge is analogous to the ordinary improvement tax imposed upon certain property by the performance of conditions which have been finally and judicially determined to have been performed.

The laws of the State and the judgment of the Court fixes the tax or charge—the assessment or valuation of the property having been determined.

The result of the apportionment sought to be secured under judicial direction, against the property already specifically charged by law, is exactly the same result which would be accomplished did the agents of the municipality perform the duties imposed upon them by the law of the State, and specifically required of them to perform by the mandate of the Court. Each owner of property who may be subjected to payment is subjected to nothing but his proper proportion of this lawful charge. This is neither novel nor extraordinary. It is the result which inevitably follows in every

instance where a *mandamus* of this character has been obeyed by the person to whom it is directed. Such a *mandamus* has been obeyed in dozens of instances in Missouri and elsewhere. It is much less of an interference with powers of local subdivisions of State territory than the proceedings to which inhabitants of towns in New England states have from time immemorial been subjected as part of the common law. For, there, the drastic proceeding is enforced of subjecting each inhabitant to a joint and several liability for the whole debt; for the property of any inhabitant may there be taken under execution for payment of the full amount of a judgment against a town.

Bloomfield v. Charter Oak Bank, 121 U. S. 121 (*l. c.* 129).

2nd. The agents of this municipal corporation are not the officers of the State. The county is not the State and has no immunity from suit, nor do its agents enjoy any more immunity from process or control in this controversy than they would have if they were the agents of a private corporation. Cities, towns, counties and townships and the agencies thereof are treated alike in consideration of their relations to creditors upon contractual obligations and in the control over them by the judiciary in the exercise of ministerial or administrative powers by the highest judicial authority of the State of Missouri. They do not constitute, as to such matters, a part of any one of the departments of government within the meaning of the State Constitution which divides the powers of the Government into three departments—the legislative, executive and judicial.

State *ex rel.* v. Gates, 190 Mo., *l. c.* 556;
St. Louis v. Russell, 9 Mo. 507.

Therefore no control exercised over them to the end of enforcement of the rights of a suitor in the Federal Court to the end of securing performance of duties required by the legislative power of the State can be an interference with the powers of any department of the State Government.

3rd. The County Court as constituted when this contract was entered into, and as it has ever since remained, was by statute and the Constitution of Missouri subject in all matters to the supervisory control of the judicial power.

Section 4, page 225, Gen. Stats. Mo. 1865, provided that "all claims, local and transitory, against any county may be commenced" in the Circuit Court of the county (the Circuit Court being the court of general jurisdiction), and in the case of Givens v. Daviess County, 107 Mo. 608, it was there held that a demand was not necessary to be made upon the county prior to the bringing of a suit in the Circuit Court. This case effectively disposes of any claim that there is any exclusive action necessary by the officers of the County Court to vitalize a claim against a county in Missouri.

The statutes printed in the appendix show how completely this body is by the laws of the State under the direction and control of the judiciary. In State *ex rel.* Wilson v. Rainey, 74 Mo. 229, it was expressly held by the Supreme Court of Missouri that a **levy of taxes made in pursuance of an order of a United States Court could not be questioned**; that such a **JUDGMENT** "against a county or its legal representatives in a matter of general interest to all of the people thereof, **as one respecting the levy and collection of a tax**, is binding, not only on the official representatives

of the county named in the proceedings as defendants, but upon all of the citizens thereof, though not made parties defendant by name."

4th. In addition to the general supervisory control over the County Court given by law to the judiciary, as to this particular class of cases, the special power was by statute conferred upon the judiciary to require the performance of any duties which the County Court might refuse to perform, by *mandamus*. See page 438, Vol. I, R. S. Mo. 1855; Sec. 22, p. 306, Art. II, Chap. 37, Wagner's Mo. Statutes 1870, printed in appendix, and the present statutes of the State which confer full power upon the judiciary to enforce all duties relating to taxation

"BY MANDAMUS OR OTHERWISE."

Secs. 11416 and 11417, R. S. Mo. 1909, printed in full in appendix.

These statutes plainly confer the power on the judiciary to enforce specific performance of all duties relating to taxation where the rights of a creditor are involved and remove any objection which may attempt to be raised to the securing of the performance of duties enjoined by the Legislature by "**Mandamus or OTHERWISE**" by Federal Courts, for the employment of any necessary means by "*mandamus* or **otherwise**" would certainly be "agreeable to the principles and usages of law" in Missouri.

5th. Every officer charged with any duty necessary to the collection and payment of this tax was, by the laws in force at the time this contract was created, under the supervisory control of the judicial power. There was no act which it was the **exclusive province**

of any individual to perform; there was no omission which it was not within the power of the judiciary to supply. As to the County Court or Board itself there was no act which it was required to do that the courts of general jurisdiction could not do either under their supervisory control powers, or concurrently. As to the other officers, the judicial power might appoint substitutes.

The Sheriff was *ex officio* Collector of the Revenue (Sec. 1, Chap. 135, R. S. Mo. 1855). A substitute might be appointed for this officer by the judiciary (Sec. 37, Chap. 47, R. S. 1855), as well as Sec. 18, Chap. 133, G. S. 1865, provides: "Where there is no **sheriff** or **other ministerial** officer qualified to act, **or where they are interested or prejudiced,** the Court may appoint one or more persons to execute their process and perform any other duty of such officer."

The court, in Missouri, may appoint a clerk temporarily (State *ex rel.* Sheppard, 192 Mo. 509, 517).

These provisions, then, coupled with the consideration that the enforcement of the rights herein are not a part of the ordinary political powers, that these ministerial agents, having refused to perform, cannot claim any exclusive right to performance upon the ground that they are entitled to fees for performance, and under the rulings of this Court that the ordinary rules applicable to private corporations should apply (wherein the State of Missouri, by statute, expressly provides for performance by substitution when *mandamus* has been disobeyed) afford on reason and authority perfect ground for the enforcement of the performance of these duties by means other than *mandamus*, and remove all possible objections to the application of Equity Rule No. 8 or the application of

any other usual equitable remedy necessary to enforce the jurisdiction of the courts of the United States.

Upon the subscription to the stock and the issuance of the bonds in payment thereof, by the express provision of the act of the Legislature, a fund was created for the payment of the bonds (see acts below), which, in law and in **equity**, by the express language of the act, **before** collection became **a trust fund for the benefit of the bondholders.**

State *ex rel.* v. County Court, 128 Mo., *l. c.* 444;
Ray Co. v. Bentley, 49 Mo. 236;
Hawley v. Fairbanks, 108 U. S. 543;
Roberts v. N. P. R. R. Co., 158 U. S., *l. c.* 17.

A charge or lien upon the property made subject by the legislative act to the payment of these bonds, as was done by the express provisions of the law, is not only a contract for the collection of the fund, but is a trust. To contend that until the fund is actually **collected** no trust arises is to deny the earliest and most imperative exercise of equity jurisdiction. Such a theory would deny the application of jurisdiction in equity over trusts in favor of creditors of any corporation when the assets of the corporation had not been reduced to specie, and is supported by no precedent, where, as in this case, the terms of the trust are definite and certain and the *corpus* out of which the fund shall arise is *in esse*.

Curran v. State of Arkansas, 15 Howard 304;
Lenox *et al.* v. Roberts, 2 Wheat. 373;
New Orleans v. Warner, 175 U. S. 132;
Sec. 519, Vol. I, Story's Equity Jurisprudence.

This was in equity a contract to levy and collect the tax and, by the creation of the debt, an assignment to the creditor of the fund.

An assignment of a **chose in action** could, at common law even, always be made by the King.

> Sec. 1039, p. 347, Vol. II, Story's Equity Jurisprudence.

Trusts, in equity, may attach, not only to choses in action, contingent interests and expectancies, but also to things which have no present actual or potential existence.

> Sec. 1040, page 348, Story's Equity Jurisprudence, Vol. II.

The County of Dallas and the adjoining counties became the owners of the greater part of the capital stock of this railroad in exchange for bonds of the respective counties.

The bonds, upon which judgments were rendered, were issued under the 14th section of the act of the Missouri General Assembly of January 11th, 1860, entitled "An Act to Incorporate the Laclede & Fort Scott Railway Co." (the whole of the act being incorporated in the petition), which is as follows:

> "It shall be lawful for the County Court of any county in the State to subscribe to the stock of said company, or invest its three per cent fund, or any other internal improvement fund belonging to the county, as stock in said road; and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay for the same, and to take proper steps to protect the interests of the county; may appoint an agent to represent the county, vote for it and receive its dividends."

There was in existence at that time a general law providing for the payment of bonds which might be

issued by counties for railroad purposes, which law continued in force until after the issuance of the bonds (p. 427, Revised Statutes of Mo., 1855).

"Section 30. It shall be lawful for the County Court of any county, and the City Council of any city, to subscribe to the capital stock of any railroad company duly organized under this **OR ANY OTHER ACT** in this State; and the County Court or City Council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the taxpayers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation.

"Sec. 31. Upon the making of such subscription by any County Court or city, as provided for in the previous section, such county or city shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this act or by the charter of the company in which such subscription shall be made.

"And in order to raise funds to pay the installments which may be called for from time to time by the Board of Directors of such railroad, **it shall be the duty** of the County Court or City Council making such subscription to issue their **bonds** or levy a special tax **upon** all property and **taxables** made taxable by law for state and county purposes, and upon the actual capital that all merchants and grocers may have invested in business in the county or city, to pay such installments, **to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription; but the total amount of taxes levied for railroad purposes in any one year in any county**

or city shall not exceed thirty per centum of the subscription made by such county or city; and in case a subscription be made to the capital stock of the same railroad by a county and also by a city situated within such county, the special tax aforesaid shall not be levied in both such county and city, but the tax levied for such **county subscription** shall be levied outside the limits of such city; **and for the purpose of levying and collecting the tax aforesaid, the same books may be used as employed by the assessor for taxes for State and county purposes and the last previous assessment for those purposes** shall be taken."

And as delegating to the judiciary control over the matter:

"Section 35. Any County Court refusing to perform any of the duties required of it by this act may be proceeded against by writ of *mandamus*, to be issued out of the Criminal Court for the county so refusing."

Page 438, Vol. I, R. S. Mo. 1855.

And Section 56 provided, same page:

"The Legislature may, at any time, alter or amend this act, but such alteration or amendment **shall not impair the rights of companies previously organized** or take away or impair any remedy given against any such corporation, its stockholders or officers for any liability which shall have been previously incurred."

No amendment in any particular was ever attempted by the Legislature up to the time of the organization of the company under the special act before quoted, and no amendment was passed until after the rights

of the bondholders were fully vested. The subsequent requirements that an election be held before the County Court could act were held inapplicable and not affecting the right conferred to issue the bonds with or without an election, the provision in the general law as to an election being held to be a merely advisory requirement and not a condition of the right of the County Court to issue the bonds.

The law then in force permitted amendment of the general law, but prohibited the Legislature from impairing the rights of companies organized previous to any such amendment.

Sec. 21, Art. II, Chap. 37, Wagner's Missouri Statutes 1870, page 306, provides:

> "Any County Court, city or town which has heretofore subscribed to the capital stock of any railroad in this State shall be entitled to the privileges **and subject to the liabilities of other stockholders in such company**, and the **County Court** or City or Town Council shall have all the rights and powers to **provide funds to pay such subscription** as are granted to County Courts and cities by this chapter and may levy a **SPECIAL TAX TO PAY THE INTEREST ON THEIR BONDS OR TO PROVIDE A SINKING FUND TO PAY THE PRINCIPAL.**"

The chapter provides for future subscriptions of counties to railroads upon vote of two-fifths of the inhabitants (held inapplicable to Dallas County in numberless cases because the original charter did not make an election necessary to the subscription or issuance of the bonds) and then provides (Sec. 18, p. 305):

> "Upon the making of such subscription by any

County Court, city or town, as provided for in previous sections, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this chapter or by the charter of the company in which such subscription shall be made; and

"**In order to raise funds** to pay the installments which may be called for from time to time by the board of directors of such railroad, **it shall be the duty of the County Court** or City Council or trustees of such town making such subscription to **issue their bonds** or levy a special tax **upon all property made taxable by law for county purposes** and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town to pay such installments, to **BE KEPT APART FROM OTHER FUNDS AND APPROPRIATED TO NO OTHER PURPOSE THAN THE PAYMENT OF SUCH SUBSCRIPTION**; but the total amount of tax levied for **railroad purposes** in any one year in any county, city or town shall **not exceed thirty per centum of the subscription made by such county, city or town;**"

and Sec. 22 (p. 306, Art. II, Chap. 37, Wagner's Mo. Stat. 1870) provides:

"Any County Court refusing to perform any of the duties required of it by this chapter may be proceeded against by writ of *mandamus*, to be served out of the **Circuit** Court for the county so refusing."

Here, then, is the full authority to create the debt, followed by the actual creation of the debt, the author-

ity to create a fund by the levy of a special tax upon certain designated property upon the basis of a certain valuation of property and, by operation of law, a contract to levy and collect the tax—the creation of a trust fund, with the agents of the county as the trustees thereof, for the use of the creditor. The assessment has been made. The raising of the fund to pay the debt is the mere accountant duty, under the law, of apportioning to each owner of property his proportion of the debt according to the assessment already made.

State *ex rel.* Brown v. Wilson, 216 Mo. (*l. c.* 286-7).

This is the duty enjoined by law and commanded by the courts in repeated writs of *mandamus;* and by refusing to perform the duties commanded to be performed by the writs of *mandamus* the agents of the debtor place the plaintiff and those similarly situated "in a condition in which his rights live but in grace, and his remedies in entreaty only."

Considering now only the right of the plaintiff to specific performance of the duties required by the writ of *mandamus:*

If, as has been repeatedly stated, this municipality occupies the same relation to a creditor that a private corporation would under the same circumstances, and if, as must be conceded, the fund sought to be raised falls under the head of an implied trust by operation of law, why should the agents of the corporation be permitted to nullify the contract and defeat the trust?

It is not deemed necessary to repeat the numberless decisions of the Supreme Court of the United States that this is in no respect a suit against a State. The

11th Amendment of the U. S. Constitution is in no way involved.

It is the Legislature which has the constitutional power to direct the agents of a county to cause work to be done, to determine that a fund to be created by taxation is a public use, and to direct that a tax be levied to create the fund. All this has been done by the Legislature. There is nothing for the agents of the county to perform except purely ministerial acts. A tax imposed by the General Assembly is as constitutional as if imposed by vote of the people of the county.

Hamilton v. St. Louis County Court, 15 Mo. 3;
State *ex rel.* v. St. Louis County Court, 34 Mo. 570;
State *ex rel.* Wilson v. Rainey, 74 Mo. 229;
Wells v. City of Weston, 22 Mo. 389.

If the Legislature should order the County of Dallas specially to levy a tax of $70,500 annually to pay these bonds (if such special legislation were now permissible under the present Missouri Constitution, which it is not), would the plaintiff have any greater right to a remedy than he now has under the law? We say that this is practically already done by the Legislature and has been specifically ordered to be performed by the court.

Have the agents of the county the right to defeat the will of the Legislature and the power of the courts which seek to enforce that legislative will? Is the performance of the act required to be performed by the writ of *mandamus* and refused to be performed by the agent of the county incapable of performance by an officer of the court? The court below says such performance is not a proper judicial act. Courts take

charge of railroads, involving millions of dollars, the control of which affects the fortunes of many communities, and administer their affairs in the enforcement of rights of creditors. Courts do not limit themselves to mere supplications to perform duties to agents of the greatest business corporations. Why, then, should they do so in the case of the agents of a municipal corporation?

It appears, from the decisions, that the only reasonable objection ever urged against the application to municipal corporations of all of the common remedies applied in favor of creditors against private corporations, as, for instance, the appointment of an officer by the court to collect assets, such as unpaid demands due the corporation, and apply the same to the payment of the debts of the corporation, is that such action as the levy and collection of taxes involves the exercise of the taxing power. It is here to be noted that this objection applies with equal force to the issuance of a writ of *mandamus*. The writ of *mandamus* cannot be issued except to compel the performance of a duty already prescribed by the taxing power, to-wit, the Legislature; but **whenever the writ of mandamus may properly issue to compel and specifically direct the performance by a ministerial agent of a duty already required by the taxing power, THEN THERE IS NO REASON WHY THE POWER OF THE COURT SHOULD BE PARALYZED BY THE REFUSAL OF THE AGENT TO OBEY THE WRIT.** There is no express authority for the issuance of an original writ of *mandamus* as a prerogative writ by the United States courts to control the action of either State or Federal officers. That is conceded, but where necessary to the protection of any private right in any cause over

which the United States courts have jurisdiction, the writ of *mandamus*, mandatory injunction and numberless other remedies may be applied as **ordinary process, when necessary to enforce the right.** Every decision denying the power of the judiciary to enforce its decrees by directing or enforcing the payment of a tax for the satisfaction of a judgment contains either the direct, positive statement, or the reasonable inference, that **if the Legislature had prescribed the performance of the duty, if the duty were ministerial, and if the Legislature had committed to the judicial power the duty of supervision and control of the taxing power, THEN THE DECREE MIGHT BE THUS ENFORCED.**

It is only in such cases that a *mandamus* or mandatory injunction directing performance of a particular act, can properly issue. Is not a *mandamus* directing the specific performance of an act as much an "interference," if there be **any** "interference," with other departments of government as would be the performance of the act by some other person by direction of the court — when the first person commanded refuses to perform?

The appellant contends that in no State of the Union are the ordinary officers who are charged by specific enactment of the Legislature with the duty of raising funds by taxation for general and special purposes **so completely under the control, by express enactment of the Legislature**, of the judicial power, as in Missouri.

The statute of Iowa under which the appointment of a marshal as a commissioner to levy a tax in satisfaction of a judgment, which appointment was upheld in **Supervisors v. Rogers, 7th Wallace 175**, was in no respect as strong as the statutes of Missouri **expressly**

conferring upon the judiciary the superintending control over matters of taxation at the suit of any private person interested therein.

The Iowa statute referred to is as follows:

> "The court may, upon application of the plaintiff, besides or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by the plaintiff or some other person to be appointed by the court, at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court or by a referee appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expense and costs and enforce payment thereof by execution."

This appears as Section 3770, Revised Laws of Iowa, 1860. The learned judge below, in the opinion in the case at bar, says: "Supervisors v. Rogers, 7th Wallace 175, is cited. That was an Iowa case, but transferred to another court for trial. The Court held that a commissioner could be appointed. But the holding was expressly based on a then existing Iowa statute which, from its reading and construction by the State courts, authorized it."

The court below errs in this statement. There is no decision of the Iowa State courts **from which any one may draw the inference** that the Iowa State court applied this statute to control by the judiciary of matters of taxation except upon the theory that, **unless specially exempted, the officers of a municipal corporation are subject in all matters to general laws affecting individuals and agents of private corporations.** The Iowa statute was no more than the new rule No. 8 of the Su-

preme Court of the United States, which is much stronger authority and ground for compelling specific performance in the case at bar than was the statute of Iowa, cited in Supervisors v. Rogers; and if authority to compel specific performance were there upheld, as it was, against a municipal corporation because the municipal corporation was not expressly exempted from the operation of a rule of procedure applicable by its general terms to all defendants, then appellant earnestly contends that Rule No. 8, the *mandamus* having been properly issued and disobeyed, is properly applicable here and may be applied to future orders in the course of the proceeding by creditors bill inaugurated by this suit. Rule No. 8 is:

* * * * * * *

> "* * * If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides or instead of proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, as far as practicable, by some other person appointed by the court or judge at the cost of the disobedient party, and the act when so done shall have like effect as if done by him."

Able judges in the Supreme Court of the United States have often insisted, sometimes in majority and sometimes in dissenting opinions, that the mere authority by the Legislature to a municipality to create a debt is authority to levy a tax to pay the debt; that when the jurisdiction exists in the Federal Court to adjudge the debt and declare the duty of payment, jurisdiction also exists to enforce payment—without authority from the State Legislature. But the right to

relief in the case at bar rests upon no such general proposition, upon no **implied** authority. The authority to enforce payment, to control taxation to the end of payment, is **direct, positive, express and specific.** The case at bar contains all of the factors justifying specific performance, full authority to the judiciary to enforce its decrees, and, the assessment of values being made, elimination of all but purely ministerial duties from the performance. In no case heretofore presented for review to an appellate court has it appeared that any State had **so plainly and so completely conferred upon the judicial power** the control over matters of taxation at the suit of any one having contract rights dependent thereon or interested therein, as has the State of Missouri.

This is evidenced by:

(*a*) The Supreme Court of Missouri has repeatedly asserted, independently of statute, the right of all courts of the State to control over all matters of taxation, general and special, at the private suit of any one interested, as part of its general equity jurisdiction.

Newmeyer *et al.* v. Mo. & Miss. R. R. Co. *et al.*, 52 Mo. 81.

The entire procedure of enforcement of taxes, general and special, is now by suit in the courts of general jurisdiction, the Circuit Court.

And in ordinary cases the power to decree specific performance as part of its equitable jurisdiction inherently existing in the court is declared in all cases where the performance of the act was part of the contract. This is not confined to agreements to convey lands.

Hardy v. Matthews, 42 Mo. 406;

Butler v. Murphy, 106 Mo. App. 287;

Blair v. St. L., K. & N. W. Ry. Co., 92 Mo. App. 538;
Hiatt v. Williams, 72 Mo. 214;
Sharkey v. McDermott, 91 Mo. 647.

(*b*) The present Missouri Constitution provides (Section 10, Article II) (same in substance in 1865):

> "The courts of justice shall be open to any person and **certain** remedy afforded for every injury to person, property or character, and that **right** and **justice** should be administered without sale, **denial** or delay."

The courts established of general jurisdiction are granted following powers:

> "The courts hereby established shall have power to issue all writs which may **be necessary in the exercise of their respective jurisdiction.**"
>
> Sec. 36, Chap. 47, R. S. 1855, p. 538, and Sec. 17, Chap. 133, R. S. 1865, p. 538.

The **County** Court, which now is, in its powers, but a board of county commissioners having control over fiscal affairs of the county—schools, roads, poor, etc.—had, prior to 1865, also jurisdiction of the trial of petty causes. Over this "court", while it exercised jurisdiction over petty controversies between individuals as well as management of county affairs, then, as since, when its duties are but as the fiscal agents of the county, the Circuit Court has, by the Constitution and laws of Missouri, exercised supreme power, supervision and control.

Sec. 8, Chap. 47, R. S. 1855, p. 533, is as follows:

> "Sec. 8. The Circuit Courts in the respective

counties in which they may be held shall have power and jurisdiction as follows:

* * * * * * * *

"Fourth. Appellate jurisdiction from the judgments and orders of County Courts and justices of the peace in all cases not expressly prohibited by law, and shall possess a superintending control over them."

The Constitution of 1865 provided (Sec. 21, Art. VI):

"The Circuit Courts shall exercise a superintending control over all such inferior tribunals as the General Assembly may establish and over justices of the peace in each county in their respective circuits."

And Sec. 23, same article, provides:

"Inferior tribunals, to be known as County Courts, shall be established in each county for the transaction of all county business."

And Section 23 of Article VI of the Constitution of 1875, now in force, provides:

"The Circuit Court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace and all inferior tribunals in each county."

The above are the general provisions empowering the Circuit Courts to exercise superintending control over the board known as the County Court. As showing the extent to which concurrent jurisdiction is exercised by the Circuit Court, the court of general jurisdiction

in Missouri, over ordinary county business, see Givens v. Daviess County, 107 Mo. 608.

As to the power given to the judiciary to enforce the remedy provided by contract in the case at bar, we are not left to the mere general expression of "superintending control," but the authority and duty to specially enforce the performance of the levy are expressly imposed by the following provisions:

Section 22 (see page 306, Article II, Chap. 37, Wagner's Mo. Statutes 1870), the chapter relating to this matter:

> "Any County Court refusing to perform any of the duties required of it by this chapter may be proceeded against by writ of *mandamus*, to be served out of the Circuit Court for the county so refusing."

This provision, coupled with the duty conferred upon the Circuit Court of exercising a "superintending control" over the County Court, certainly does not limit the remedy to the **ISSUANCE** of a writ *mandamus*. The Legislature clearly intended to confer upon the court of general jurisdiction the power **to COMPEL the performance of the duties with relation to this special tax.** The defendant contends that the plaintiff is limited in his remedies to the **issuance** of a writ of *mandamus*, **not to its obedience**; to an exhortation to pay the judgment, not to payment! Did the Legislature intend to confer upon the petty agent of the municipality the power to destroy the availability of this fund to the creditor by the simple expedient of the petty agent refusing to obey the writ, and that thereupon the judicial arm should be paralyzed? Majestic states, acting through all of their powers of govern-

ment, have not been able to destroy the **obligations of a contract** (which includes the duty of performance).

Curran v. State of Arkansas, 15 How., *l. c.* 320.

And yet here, according to the defendant, has been found a safe and secure way to do so by the petty agent of a municipality! Is it not a conclusion consonant with reason and regardful of the dignity of the Legislature of Missouri that, by this provision, the judicial department **was clothed with the power and charged with the duty of enforcing the levy of the tax, the collection thereof and the application of the tax to the payment of the obligation?**

Who can truthfully say, in the light of these provisions, that if, when the petty agent refuses to perform that which the court is authorized to command, the court appoints another agent to perform the act, the court is invading the power and duty of another department?

The United States Court, in such a case, is no more invading the power of another department than when it directs its marshal to perform in execution of its judgment the same act which would be performed by the Sheriff had the cause been in the State court.

I repeat, the above provision for the enforcement of these duties by *mandamus* does not indicate that a limitation to that remedy was intended in the event it should not be effective. That remedy was inserted only because it was never then contemplated by the Legislature that the writ of *mandamus* would ever be disobeyed by the agent of a county. No case has been found where a **writ of mandamus has ever been disobeyed by the agent of a county when issued by a State court in Missouri,** or in any other State, except in the

State of Washington, where the court found a remedy on much less secure reason than here (see State v. Middle Kittitas Irrigation District, 106 Pacific Reporter, 203, which case is hereinafter referred to at length).

The provision for *mandamus* in the above statute of Missouri was, we conceive, strongest possible expression of the plain intent of the Legislature to subject these fiscal agents to the control of the judicial power in order to secure the levy and collection of the tax to the end of payment of these bonds. It was then not considered possible that any minor agent would disobey such a judicial order. It was only after agents of counties, like these in Dallas County, had disobeyed writs of *mandamus* issued by the **Federal** courts, when the possibility of disobedience, under like circumstances, of writs to be issued by State courts became apparent. Thereupon, in 1879 the Legislature of the State of Missouri expressly committed to the judicial power; that is, to the **Circuit** Courts of the State, the full determination of the question when taxes (other than the ordinary taxes for the maintenance of the county government) should be levied, and expressly provided that the orders of the Circuit Court should be enforced by **mandamus OR OTHERWISE**, thus, as we contend, removing all doubt that the **enforcement of the mandamus,** when disobeyed, by any and every method which may properly accomplish the act **by the judiciary,** is by the **express authority** of the supreme taxing power of the State, to-wit, the Legislature, **EXPRESSLY AUTHORIZED**. Under these conditions, who shall say that the specific performance of the decree is an unwarranted invasion by the judiciary of the powers of another department?

Said sections, as they now appear in the Revised Statutes of Missouri of 1909 as Sections 11416 and 11417, are as follows:

(These sections originally adopted in 1879; see Laws 1879, p. 185.)

"Section 11416. The following named taxes shall hereafter be assessed, levied and collected in the several counties in this State, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this State, viz: The State tax and the tax necessary to pay the funded or bonded debt of the State, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages and for schools.

"Section 11417. No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The Prosecuting Attorney of any county, upon the request of the County Court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment levy and collection of other taxes than those enumerated and specified in the preceding section, shall present a petition to the **Circuit Court** of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such **Circuit Court** or **judge** thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this State, shall make an order directed to the County Court of

such county **commanding** such court to **have** assessed, levied and collected such other tax or taxes, and **shall enforce such order by MANDAMUS OR OTHERWISE.**

"Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the Circuit Court or judge thereof granting the same; provided, that no such order shall be modified, set aside or annulled unless it shall appear to the satisfaction of such Circuit Court or judge thereof that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this State or unless it shall appear to said Circuit Court or judge thereof that the necessity for such other tax or taxes or any part thereof."

The above statute, in so far as it prohibits by implication the levy of a tax to pay indebtedness contracted prior to 1879 except in the manner above provided by statute, has (particularly in the requirement that no tax shall be levied except upon the order of the **State** Circuit Judge) been held invalid if limiting the rights of the holders of judgments of United States courts. See Seibert v. Lewis, 122 U. S. 284, wherein it is held that any limitation or requirement of the taxing power which interferes with the remedy of the creditor accrued prior thereto violates and impairs the obligation of the contract.

The vital part of this statute and its paramount importance in the consideration of the controversy now before this court, is that it commits to the judicial power of the State the power to enforce by **mandamus**

or **OTHERWISE** the acts necessary to execution of the taxing power by the performance of such duties as may have been enjoined by the Legislature; expressly waives, by the State, all objection to such execution being an invasion of legislative power, and is, if logical deduction be not entirely abandoned, sufficient authority for the application by the Federal courts, in proper cases, such as this, of remedies **other than mandamus, when mandamus shall have failed.**

This jurisdiction of the United States courts to accomplish full and adequate relief to suitors under its protection is not denied or attempted to be denied by the State of Missouri by any of its departments of sovereignty. The executive does not deny it; the Legislature does not deny it; the judiciary does not deny it. The case of State *ex rel.* Wilson v. Rainey, 74 Mo. 229, was one wherein the County Court of Greene County obeyed a *mandamus* issued by the United States court. Rainey attempted to set up, in a suit to collect from him the proportion of the tax to which his property was subject, that the tax was invalid; that the bonds and coupons upon which the judgment was founded were void. It was therein expressly held that a levy made in pursuance of an order of a United States court could not be questioned; "that a judgment against a county or its legal representatives in a matter of general interest to all of the people thereof, **as one respecting the levy and collection of a tax, is binding not only on the official representatives** of the county named in the proceedings as defendants, but **upon all the citizens thereof, though not made parties defendant by name.**"

"This, we think, is so, both on principle and au-

thority, for in suits of the character mentioned the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on as a **taxpayer to contribute his proportion to liquidate the demands which a judgment may establish.**"

Now, what created the liability against the taxpayer for his proper proportion of this demand which he must liquidate? What precluded him from the defense that the levy was made to pay a void obligation? If such a levy had been made without the order of the United States Court, would he not have been permitted to make this defense? Undoubtedly! Then it was not the formal entry of a levy by the County Board which vitalized and made effective the demand against him. **It was the order for the levy made by the United States Court in accordance with the law before passed by the Legislature authorizing a levy to be made, WHICH WAS THE VITALIZING FORCE** — without which this proportionate demand could not exist. Upon what reasoning, then, can it be held that the refusal of the agent of the county to obey this order can destroy the power of the court to enforce the demand and vindicate the obligation?

Appellant respectfully suggests, therefore, that the specific performance by an officer of this court of the ministerial duties necessary to vindicate the jurisdiction of this court and to protect the creditor in the performance of the obligation of a contract cannot be objected to in Missouri as an unwarranted exercise of judicial power — whatever may be the rule in Kentucky or some other State where no control over taxation or revenue has been specially vested in the judiciary, or

where, as in Kentucky, supervision and control over matters of taxation and revenue, even though as incidental to the protection of rights of creditors, has been, by the Kentucky Constitution, prohibited to the judiciary. Creditors in such States contract debts with knowledge and notice of such limitations. In Missouri creditors contract with the right to rely upon enforcement of the debt by the judiciary as a part of the contract.

The next question is what control had the judiciary of Missouri over the other purely ministerial officers who, when this debt was created, were charged with ministerial duties connected with the imposition and collection of this special tax? **What special exemptions can they claim excluding them from the operation of the general rule that trustees cannot, by their default, defeat a trust?** What sanctity is there in their persons which permits them as agents to, by their misfeasance and non-feasance, defeat claims against their principal? What vested rights have they to the exclusive performance of duties which they refuse to perform?

In the process of levy of a tax there is one step, **and one step only** (where, as here, the amount to be raised is definite and certain), where it may truthfully be said that discretion is involved. That step is the making of the assessment—that is, the **valuation of the property upon which the tax is to be levied.** That act of discretion is eliminated in this case. The act of the Legislature expressly makes the assessment of values of property made for the general State and county purposes the basis for the levy of this special railroad tax. Such assessment has already been made and photo-

graphic copies thereof already secured, so that the single act in the effectuation of the obligation involving any discretion whatever is already performed.

But, as evidencing how completely even this discretionary act is within the control of the judicial power of Missouri and is not dependent upon a particular officer elected by the people, see the following provision of the Statutes of Missouri, appearing as Section 16, Chapter 135, R. S. of Mo. 1855, p. 1329, and as Sec. 7 of Chap. 12, G. S. of Mo. 1865, p. 99:

> "Every assessor who shall fail to perform any duty enjoined upon him by law in the time prescribed may be removed from office by the County Court, who shall appoint another in his stead."

The Sheriff, at the time of the creation of this debt and for many years after, in this and in practically all of the counties of Missouri, was *ex officio* Collector of the Revenue (Sec. 1, Chap. 135, R. S. of Mo. 1855, p. 1338).

A substitute might be appointed for this officer by the judiciary. Sec. 37, Chap. 47, R. S. 1855, as well as Sec. 18, Chap. 133, G. S. 1865, provides:

> "Where there is no Sheriff or **other ministerial** officer qualified to act, or where **they are interested or prejudiced**, the court may appoint one or more persons to execute their process and perform any other duty of such officer, who shall be entitled to such fees for their services in each cause as are allowed by law to sheriffs in like causes."

This important officer was charged with the entire duty of collecting taxes, and under the laws prior to the year 1877 (when a new system, that is, a suit against

each owner in the Circuit Court, was provided for) proceeded to distrain personal property and to sell, practically as a proceeding *in rem*, real estate when in default for taxes. See system of enforcement of collection of revenue provided for in Chap. 13, General Statutes of Missouri, 1865, page 122, and following, and yet that important officer might be displaced and a substitute appointed by the judiciary! The court may appoint a clerk, temporarily, in Missouri.

State *ex rel.* Sheppard, 192 Mo. 509 and 517.

These statutes, we think, sustain the proposition that there is no objection to the judiciary enforcing its decrees in Missouri by the temporary appointment of an officer of the court to perform certain ministerial acts necessary to the enforcement of the court's jurisdiction—when the agent of the debtor refuses to perform.

If it be held, as it has been held, that a trust was created by the Legislature and a trust for a public purpose, as the building of a railroad, has been held to be a trust within the Statute of Elizabeth on charitable uses, then there is additional express authority for the control of this trust by the judiciary, under the following statute of Missouri, long in force and now appearing as Sec. 3748 of R. S. of Mo. 1909, being as follows:

> "All counties which have been created and all counties which shall hereafter be created trustees for charitable uses, together with the trust property held, or **that may be held by them,** shall be under the supervision and control of the Circuit Courts of the respective counties, and said counties, by and through their respective County Courts, may at any time apply to their respective Circuit Courts for advice and directions in the execution of their trusts for charitable uses."

And as to trustees in "any deed of trust" to secure the payment of a debt or other liability, or to whom any property has been conveyed for the benefit or use of any person" * * * "shall neglect or refuse to act as such trustee," the Circuit Court may appoint a suitable person "to do and perform all the acts and things that the original trustee had power to do and perform with the same force and effect." Secs. 11919 and 11920, R. S. of Mo. 1909, and **independently** of statutes, the judiciary of Missouri has constantly exercised the power of removing trustees as part of its inherent equity jurisdiction and has repeatedly declared that when a trust exists, the judicial power has the same control over a corporate trustee, even though it be a municipal corporation, as it would have over a private individual.

St. Louis v. Wenneker, 145 Mo. 230, *l. c.* 236;
Hardy v. Clarkson, 87 Mo. 171;
Gaston v. Hayden, 98 Mo. App. 683,

and upon the power to appoint receivers as inherent in courts exercising equitable jurisdiction, independently of statutes: See Werhrs v. Sullivan, 217 Mo. 167; Hanson v. Neal, 215 Mo. 256, and Bernard v. Keathley, 230 Mo. 209.

When the legislative department has provided the method for raising the fund to pay the debt, when there is no discretionary act to be performed, when the State courts hold that the acts sought to be performed are not invasions by the judiciary of another department of government, what tenable objection can there be to it? Is it the right of the State to provide its own method of collecting revenue? The State has declared that **this fund is no part of the State or of the county's revenue!**

The Legislature has already provided the method, and the remedy here sought is in conformity therewith. Is the right of the taxpayer violated? **His liability is fixed. It can be of no consequence to him to whom he pays it.** His obligation is neither enlarged nor his liability increased by this method.

Is it the right of the officer of the county to exclusively perform these duties? He has already refused to perform his duty and has waived all rights to receive compensation for performance by his refusal to perform. Is it the right of the taxpayer to the exercise of the discretion of a certain elected officer in his county? There is no discretion to be exercised. The obligation is fixed, certain and immutable.

IN WHAT CASES HAVE ORDINARY REMEDIES BEEN APPLIED BY THE UNITED STATES COURTS TO MUNICIPAL CORPORATIONS IN THE ENFORCEMENT OF CONTRACTUAL RIGHTS OF CREDITORS?

In Supervisors v. Rogers, 7th Wallace 175, as shown above, the full remedy asked for here was applied with less express and less implied authority from the State of Iowa than is given in this case by the State of Missouri. This case is unreversed and is, under the admitted facts in the case at bar, a binding precedent.

In Street R. R. Co. v. Hart, 114 U. S. 654, after a judgment upon a general obligation of the City of New Orleans, for which no special levy of taxes was by the Legislature provided, and therefore not so strong a case as the case at bar, a supplemental proceeding was instituted to garnishee the Street Railroad Company and subject to the payment of this general judgment a certain bonus of two-sixteenths of a cent per passenger which bonus the street railroad company had

agreed to pay the city. It was distinctly held that the ordinary remedies applicable to ordinary individuals might be applied in favor of creditors against a defaulting municipal corporation, and it was further held that an express provision of the Legislature attempting to exempt the City of New Orleans by making it unlawful to issue any writ of execution or *fieri facias* from any of the courts in Louisiana against the City of New Orleans to enforce the payment of any judgment for money against that city, was inoperative to defeat the proceeding in the United States Court.

Upon the principle of this case, *i. e.*, that municipal corporations are not exempt from application of remedies applied against ordinary debtors, and under the similar remedies statute of the United States a receiver might be appointed for this county, for it is provided by Act of March 26th, 1883, now appearing as Sec. 3012, R. S. of Mo. 1909:

> "* * * When a peremptory writ of *mandamus* shall have been issued to a private corporation and the same shall not have been obeyed in whole or in part within the time prescribed in such writ, the Court or Judge may, upon application by the plaintiff, besides and in addition to or instead of proceeding against the disobedient party by attachment, fine such corporation in any sum whatsoever, and appoint a receiver and direct that he take possession of and preserve and manage all the property, rights, privileges, franchises and business of such corporation, **AND THAT HE PROCEED TO DO THE ACT OR ACTS TO BE DONE BY SUCH PEREMPTORY WRIT OF MANDAMUS** at the expense of such corporation."

The two following cases are direct Circuit Court precedents for the remedy sought in this instance.

Post v. Taylor Co. was not appealed. Stansell v. Levee Board reached the Supreme Court on a supplemental point as Russell v. Stansell.

In *Post v. Taylor Co.* (1879), *No.* 11302 *Federal Cases*, Judge Baxter appointed a receiver, and said:

> "A decree will be entered authorizing and requiring each tax debtor to be made a defendant in this case to pay to the clerk of this court, within 90 days, the amount of the tax assessment assessed against him as shown by the copy of the assessment roll filed, and in the event he fails to do so, an execution will issue for the same."

The case at bar is identical with this, as no new assessment for the levy of this tax is necessary, the Legislature having made the assessment for the State and county purposes the basis for the levy of the special tax.

In *Stansell v. Levee Board of Mississippi District* No. 1 (1881), 13 Federal Reporter, *l. c.* 851, the Court exercised exactly the same powers as are here sought to be invoked, apportioning the tax as required by the State law and appointing the marshal of the court, instead of the Collector of Tunica County, to collect the tax. This power was exercised as an inherent power of the Court to enforce its judgments, when the power of the State had required the tax to be levied, and brushing aside the contention that these duties, required by the State to be performed, must remain unperformed, if the individual required to perform them failed or refused to do so, the Court said:

> "The order of the Court does not undertake to levy the tax, or to change it. **The levy was made**

by the Legislature in the act of incorporation." * * *

"That this remedy could be enforced by the judges and officers of the State mentioned is not denied. Such being the case, this Court has the power to adopt the same remedies in favor of a non-resident creditor who has obtained a decree against a resident defendant.

"The order follows the directions of the act of the Legislature, except that **it is made by this Court,** * * * and that in case of the collector in Tunica County (note: the Sheriff was collector) upon the refusal of the Sheriff to collect the tax, the Marshal was appointed in his stead," *l. c.* 852.

This case came before the Supreme Court of the United States as Russell v. Stansell, 105 U. S. 303. The action of the Court is recited and the relief granted was not disturbed, although this appeal of Russell, one of the property owners charged, was dismissed on the ground that the amount involved, as to him, was not sufficient to give the Court jurisdiction. The Court tersely concludes by saying "Any owner can relieve himself from all further liabilities for the district by paying his part of the assessments."

In Supervisors v. Rogers (7 Wallace 175) a commissioner was appointed, not only to perform the purely clerical duty of levying and collecting the tax, but to **assess,** under the authority of a simple statute in the State code of civil procedure which permitted the Circuit Court of the State to appoint some other person to perform a duty which may have been ordered by the Court and not obeyed.

This case, decided by the Supreme Court of the United States, overruled all of the objections raised by

Justice Miller in the previous case of Rusch v. Des Moines Co., No. 12142 Federal Cases.

In Labette County Commissioners v. **Moulton, 112 U S. 217,** although the office of **Township Trustee** was not shown to be vacant, and although the law required certain acts to be performed by the **Township Trustee** before the county judges were required to make the levy, the **Court required the judges to levy** the tax, even though the Township Trustee may have refused his consent.

Upon principle, it may properly be said that the COURT HERE SUBSTITUTED OTHER persons to make the levy, for the order of the Court dispensed with the action of an officer charged with part of the duty of levying the tax.

In Ralston v. Mo. Fund Commissioners (1886), 120 U. S., *l. c.* 411, the control by the Federal judiciary over individuals who refuse to perform duties required by State statutes, even though the disobedient individual be the Governor of the State, is emphasized. The Court says:

> "Here the suit is to get a State officer to do what a statute **requires of him.** The legislation is with the officer, not the State."

And the Court further said:

> "As the suit is in equity, jurisdiction may be retained to **determine** under what circumstances the **GOVERNOR** can be **compelled** to execute the assignment which has been provided for."

In Meriwether v. Muhlenberg Court 1886, 120 U. S., *l. c.* 357, this Court said:

> "It is clear that the levying and collection of a tax to meet a county subscription to the stock of a

> railroad company is not a business connected with the laying of the county levy, or with appropriations of money out of such levy."

In that case the question was whether a *mandamus* should issue to the presiding judge of the County Court alone, although the statute provided that the justices of the peace of the county should, with the presiding judge, compose a part of the Court when it is engaged in laying the county levy, and in appropriating money and in transacting other financial business of the county. Referring to a provision apparently requiring the joint action of the Judge and the clerk, the Court decided that it was the duty of the presiding judge alone to levy the tax (see *l. c.* 362). The Court saying:

> "As the counting must have been by **individuals**, not by a court, the requirement that the County Clerk and County Judge should perform that duty, and that the latter should cause the result to be entered on the records of the Court, does not, we think, show an intention to invest the County Court with any discretion whatever in ordering the election, or in issuing the bonds, **OR IN LEVYING TAXES TO PAY THE BONDS AND THE INTEREST THEREON.**"

Upon the question of whether there was any discretion as to allowance for payment, or any action necessary by the County Court to entitle a bondholder to payment, this Court said in County of Greene v. Daniel, 102 U. S., *l. c.* 194, in speaking of obligations similar to those which are the foundation for the judgment here (*l. c.* 194):

> * * * "They are, in legal effect, themselves warrants on the treasurer. * * *

"The claim was, to all intents and purposes, audited by the Court when the bonds were issued. The validity and amount of the liability were **then** definitely fixed, and warrants on the treasurer given, payable at a future day. The treasurer could pay them when due on presentation **without further action of the Court,** if he had funds in his hands applicable to that purpose. In his hands they would be good vouchers for money disbursed from that fund."

In King v. United States, 99 U. S., *l. c.* 233, in commenting upon the objection that no assessment had been made of a national tax, the Court said:

"If there could be any doubt upon this point, it was set at rest by the decision of this Court in The Dallas Savings Bank v. United States (19 Wall. 227), where the same objection was taken to a suit to recover the tax. The Court held explicitly that the obligation to pay **the tax did not DEPEND ON AN ASSESSMENT MADE BY ANY OFFICER WHATEVER, but that the facts being established on which the tax rested, THE LAW MADE THE ASSESSMENT, AND AN ACTION OF DEBT COULD BE MAINTAINED TO RECOVER IT THOUGH NO OFFICER HAD MADE AN ASSESSMENT.**"

In Savings Bank v. U. S., 19 Wall. 227, 240, it was decided that a suit at law might be maintained for the recovery of a tax on interest paid, **even though no list had been returned and no assessment made;** and in the opinion it was said:

"No other assessment than that made by the **statute** was necessary to determine the extent of the bank's liability. An **ASSESSMENT IS ONLY**

DETERMINING THE VALUE OF THE THING TAXED, AND THE AMOUNT OF TAX REQUIRED OF EACH INDIVIDUAL. IT MAY BE MADE BY THE DESIGNATED OFFICERS OR BY THE LAW ITSELF."

In commenting upon powers conferred to the judiciary by the statutes of Missouri over incorporated cities which are not broader than the powers conferred to the judiciary over counties, this Court said, in Louisiana (a town in Missouri) v. United States, 103 U. S. (*l. c.*) 292:

> "Both the revised statutes and this particular section of the charter contemplate judgments against the city which cannot be collected by execution. In such a case permission is given to apply to the court in which the judgment has been rendered for **special relief**, or perhaps more properly a special order on the city to make provision for payment. What that **provision shall be is left largely to the Court to determine under the particular circumstances of each case, with a view to securing the prompt and speedy payment of the debt**; but the money, when collected, must be applied strictly to the payment of the particular debt for which the special direction is given" * * *.
>
> "The effect of the several statutes is to limit the ordinary powers of the municipality for taxation, **BUT TO GIVE THE COURTS AMPLE AUTHORITY, WHEN A JUDGMENT HAS BEEN OBTAINED,** to enforce execution **by requiring the levy at a proper time, of a sufficient tax to meet the judgment.** A *mandamus* in such a case is in the nature of an execution to collect the judgment."

In the case of U. S. *ex rel.* Lansing v. Treasurer of Muscatine Co. (2 Abbott U. S. 53) decided in 1870, Judge Dillon ordered the Marshal to perform the act commanded to be performed which had not been performed.

The question is most pertinently settled in our favor by the language of the Court in U. S. v. Port of Mobile, 12 Fed. Rep., *l. c.* 770:

> "The substance of the relator's contract is that the taxing authority of the corporation shall levy and collect a certain amount of taxation to meet his demand. **It can be of no moment to him what particular officers shall exercise that taxing power,** or what may be the particular title of the officer, or the particular name of the corporation, provided it is the same corporation or body he has contracted with."

The question of **who** performs the act is rendered immaterial if the paramount law required its performance.

> U. S. v. Port of Mobile, 12 Fed. Reporter, *l. c.* 768.

In Hawley v. Fairbanks (1882), 108 U. S., *l. c.* 551, this was a creditor's bill, as is the case at bar, and, therefore, in equity. In that case the Supreme Court held that when the liability is determined, the right to the tax conclusively established, and when the **town clerk refused to make** a certificate (only upon which the tax could be levied under the statute), the Court would dispense with it, the Supreme Court of the United States saying:

> "There was no legal impediment to employment of some other means to give the **County** Clerk no-

> tice of what was the duty required of him in the premises,"

and dispensed with this apparently necessary precedent act to a valid tax.

This case upon principle holds that **it is the authority of the Legislature for the levy** and **the decree of the Court, which makes the levy, and not the performance of ministerial acts by certain designated officers.**

If these officers of Dallas County had obeyed the *mandamus* would the tax have been valid? Undoubtedly! Then can their disobedience destroy the tax? If so, they must be conceded to have, in their petty persons, greater power than the Legislature of Missouri, and the Federal judiciary combined.

As Chief Justice Waite said in Hawley v. Fairbanks, above, 108 U. S. 543:

> "Right to computation and assessment as well as to the collection of the tax followed, as a matter of law, from the establishment of **the liability of the town for payment.**"

In Deveraux v. City of Brownsville (1887), 29 Fed. Rep. 742, it was held that when a power of taxation as a means of paying debts was granted, and the debt created, the power could not be revoked; that the power and duty of taxation **devolved**, that is, **was not** a grant to the **designated** officers through which it was to be exercised. The Court said:

> "We do not imply the grant of the taxing power as a product of the Federal Constitution, nor **create** it by a judicial judgment — not at all; but we hold that the grant heretofore made has never been taken away, that while the agencies **have**

> been changed, and the methods of taxation altered other agencies and other methods have been provided upon which the law devolves the duty embodied in the general grant."

Now, logically, in so holding, does not the Court vindicate its right to **designation** of the person to perform, and does not the authority to **perform proceed from such designation by the Court,** and not from the particular office to which the person may have been elected?

When the United States Supreme Court holds, as it has in Mobile v. Watson, 116 U. S. 289, in cases cited therein, and, repeatedly since, that obligations cannot be destroyed by destroying agencies for raising the fund to pay the obligation, but that the obligation and duty to perform will devolve upon the agencies which succeed the old, even though the Legislature should prohibit the exercise of such duty by the new agency (see instance of creation of City of Selma, *l. c.* 303) is it not the **COURT** which designates the person who shall perform the duty originally authorized by the law?

In South Dakota v. North Carolina, 192 U. S., *l. c.* 321, the Supreme Court of the United States found a way to protect contractual rights by transferring property without rendering judgment against a State, and note the language on page 319 of that opinion:

> "A levy of taxes is not within the scope of the judicial power **except** as it commands an inferior municipality to execute **the power granted by the** Legislature."

There lies the plain distinction. It is not necessary to seek the Legislature for further relief. What relief

could the Legislature give the plaintiff greater than that already granted? In what stronger terms, in what language, could the Legislature of Missouri authorize the Federal courts to proceed to exercise its jurisdiction to enforce the rights of suitors under its protection than it has already spoken?

It was said in one of the earlier cases decided by Justice Miller in Supreme Court of the United States that the ancient jurisdiction of the High Court of Chancery of England—to the equity jurisdiction of which, as exercised in 1789, the Supreme Court of the United States succeeded, did not extend to control of taxation to the extent of ordering a levy of taxes. This statement is not correct. Long prior to 1789 the Chancery Court had exercised jurisdiction over tithes, which were the parish rates or taxes in England, and of "moduses" which was the composition or commutation of what before had been strictly a "tithe". At Sec. 519 of Story's Equity Jurisprudence, page 539, Vol. I, it is said:

> "In regard to tithes, also, and incidentally to moduses and other compositions, courts of equity in England exercise an extensive jurisdiction of an analogous nature. Lord Nottingham is said to have stated that the jurisdiction in the **Exchequer** over tithes by bill in equity is not earlier than the reign of Henry VIII, and that it took its rise from the statute of augmentations in his reign. But other persons assert that it had a more early origin, and in respect to extra parochial tithes, which are a part of the ancient inheritance of the Crown, they insist that suits for tithes must always have fallen within the compass of the direct and substantial jurisdiction of the Court of Exchequer, as

a Court of Revenue, and that the proper jurisdiction of tithes belongs there. **Be that as it may,** the **jurisdiction of the Court of Chancery** over the same subject seems to have been of a much later origin, or at least to have been matter of doubt and controversy to a much later period, the **jurisdiction not having been firmly established until after the restoration of Charles II THE COURT OF CHANCERY HAS EVER SINCE BEEN held to HAVE A CONCURRENT JURISDICTION WITH THE COURT OF EXCHEQUER.** This concurrent jurisdiction in both courts is now generally considered to be merely incidental and collateral, **arising from the general equitable jurisdiction of these courts in matters of account and in compelling a discovery. And therefore wherever the right to tithes is clearly established, an account is consequential; for it would be otherwise impossible to give full effect to that right unless** upon a **discovery** and account.

"If the right is disputed it must be first ascertained at law before an account will be decreed. Indeed, it may be truly said that in all **matters of tithes a court of equity is far more competent than a court of law to administer an appropriate remedy.**"

The statement of Mr. Justice Miller as to the ancient jurisdiction of the Chancery Court (if he intended to mean that the Chancery Court had no jurisdiction to order a **general levy of taxes for governmental purposes** in the absence of an Act of Parliament) is probably correct; **but this fact has nothing to do with the jurisdiction** to enforce the levy and payment of taxes authorized, by Parliament in England, or by the legislative power in a State. There are several ancient

precedents where the High Court of Chancery in England has sequestrated the tithes issues and profits of ecclesiastical livings (thus interfering with the means of subsistence of ecclesiastics of the Established Church), as in White v. Bishop of Peterborough, 3 Swanton's Reports, Ch. 117, where a receiver was appointed by the Court to collect the tithes, issues and profits; and Metcalfe v. York, 6 Simon's Reports 234, where a receiver was appointed to collect certain livings and apply to a charge created against it; and in Blackbourne v. Webster (1731), **Peere Williams Reports 2,** where a rate was **laid against the parish to respond to a charge authorized,** and in Precedents in Chancery, 43, it is said, "There are instances of ancient date in which the Court of Chancery has decreed the payment of money to be levied by a parish rate. See James v. Rich (Feb., 26th year, Chas. II). **Year cases** 1st." The learned jurist may have followed an erroneous statement in "Perry on Trusts", which cites a case as supporting the statement that equity will not enforce a trust arising or to arise from the levy of taxes, **but an examination of the case shows it to be a most convincing precedent for us.** The case is, "The Attorney-General v. Heelis."

This was an information and bill in chancery on behalf of relators, 10 occupiers of houses situate in Great Bolton, which sought to control the administration of rates to be levied **as provided by Act of Parliament,** for the improvement of Bolton Moor, prayed that the **trust funds which might arise** should be administered under the direction of the Chancery Court. It was held: **That as the Act of Parliament** dedicates a part of the moor, with the consent of those having rights of common to this moor, to the improvement of the Town

of Great Bolton, this is in **effect a gift** for public purposes and that **equity will administer the funds; and the demurrer was overruled.**

(See **2 Simons and Stuarts' Reports cases in Chancery,** p. 67).

As another instance in which it was said: "The mode in which the rate is to be levied was not to be looked at, but the purpose to which it was to be applied."

See Att'y-Gen'l v. Eastlake, 11 Hare 205.

In *ex rel.* Wm. Izard v. Brown *et al.*, 1 Swanton's Chancery Reports, 265, the Chancery Court assumed jurisdiction and direction of a fund **to be raised by taxation for a public purpose,** to the use of which private persons were entitled, and held the commissioners were **ordinary trustees** over which chancery had jurisdiction.

In the case of State v. Middle Kittitas Irrigation District, Wash. (106 Pacific Reporter 203), a commissioner was appointed to levy and collect a tax against a municipality upon the authority only of the following provision in the statutes of State of Washington:

> Sec. 4717. "When jurisdiction is by the Constitution of this State, or by statutes, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code."

The Court said in that case:

> "The disability or death of an agent does not abate the action as to the real defendant.

"If the corporation itself does not supply the agents necessary to perform its corporate duties, the Court under the statute above mentioned has ample authority to do so."

The trial judge in the case at bar says that this decision of the Washington court was based upon the statute, while he can find no authority in the Missouri statutes for like action, but is not the Washington statute but a statutory declaration of the inherent power of all courts having jurisdiction over the subject-matter? If the appointment of the commissioner be an invasion by the judiciary of the power of another department of government, where is the authority in the above statute authorizing such invasion?

The Washington statute but expresses what has been repeatedly declared, by the United States Supreme Court, to be the inherent power of all courts which have jurisdiction over the subject-matter and the parties to enter a judgment, to control the execution of their process to the end of enforcement of the judgment. (The Bank of the U. S. v. Holstead, 11 Wheat 51).

The Washington statute above referred to is certainly not as express authority for the action there taken as the Missouri statutes before quoted are, or as is Equity Rule No. 8 of the Supreme Court of the United States.

In the case of Holt County v. N. L. I. Co., 80 Fed. Rep. 686 (1897), Circuit Court of Appeals, 8th Circuit, the facts were: A tax had been levied by a school district, in performance of a judgment of the United States court.

One of the taxpayers of the school district secured an injunction against the County of Holt in the State

Court, enjoining the collection of the tax on the ground that the tax was illegally levied, that the power of the officers of the school district was limited to the levy of a tax of 25 mills instead of 50 mills, as was levied. The U. S. Circuit Court of Appeals held that the former judgment of *mandamus* issued by the United States court, in which there was an opportunity to make this defense, was *res adjudicata*, and **denied the right or power of either the taxpayer or the AGENTS OF HOLT COUNTY** to further question the levy, saying:

> "Who made them an appellate tribunal to review the judgments of the courts? Whoever heard that a sheriff could lawfully excuse himself from collecting an execution against the defendant on the ground that the judgment of the Court should have been against **the plaintiff? The fact is that under the law and the statutes in Nebraska the plaintiffs in error are the mere hands of the Court in this case, the mere ministerial officers upon whom the duty has been imposed of taking the amount owing under the original judgment of mandamus from the taxpayers in school district No. 44 and paying it over to the insurance company to whom it is due.**"

All of the judges, Sanborn, Thayer and Lockren, concurred in this opinion.

The language of the above opinion, and the reasoning upon which it is based are exactly applicable to the case at bar.

There is here, plainly, full ground for equity jurisdiction. The State courts hold that equity jurisdiction would there attach (Newmeyer v. Mo. & Miss. R. R. Co., 52 Mo. 81), and the facts stated bring the case.

undoubtedly, within the jurisdiction in equity of United States courts, the Court having jurisdiction over the parties by reason of diverse citizenship, and equity may adopt any remedy ever used by equity courts, or any remedy analogous to any remedy used by the State court in similar circumstances. **The refusal of the agent to perform is, in equity, a fraud upon the creditor, and equity has the right to consider that** as done **which should have been** done, if **necessary to afford relief.**

> "Equity regards that as done which should be done."
>
> Story Eq. Jurisprudence, Vol. I, Sec. 187.
>
> "Fraud, indeed, in the sense of a court of equity, **properly includes all acts, OMISSIONS and concealments** which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud **been prevented from being done by the** parties, interfere and treat **the case exactly** as if the acts had been done."

The **omission to levy the tax is,** under the definition above given, a fraud upon the plaintiff. It certainly would be so considered in the case of the agents of a private corporation of any duty imposed. Is it any the less a fraud when the omission is by the agent of a municipality of a duty expressly enjoined by law, and when such omission violates his oath of office? Does his belief that he is serving those who elected him in attempting to protect them from their obligations, sanctify his act, or make his omission to perform his duty any the less a fraud upon the creditor?

In Coler v. Board of Commissioners of Stanley Co. *et al.*, 89 Federal Reporter 257 (1898), the U. S. Circuit Court of W. D. of North Carolina granted the plaintiff an injunction which nullified the effect of an injunction before then granted the defendants in the State courts, and the United States Court appointed a **RECEIVER and ordered the Board of Commissioners of Stanley County to place in the hands of the Receiver moneys in the treasury of Stanley County, North Carolina, and that the Receiver hold the same subject to the further order of the United States Circuit Court.** The case was appealed to the Circuit Court of Appeals, 4th Circuit (1899), 96 Fed. 287, and the decree reversed. Upon a rehearing in the Circuit Court of Appeals (Feb., 1902) the decree **of the Circuit Court was** affirmed. See 113 Fed. Reporter, p. 705 (*l. c.* 724). The case was taken to the Supreme Court of the United States by *certiorari* and decided June 1st, 1903, appearing as Stanley County v. Coler in 190 U. S. at page 437 and the **decree was affirmed.** The jurisdiction in that case exercised was equitable jurisdiction, the grounds upon which that jurisdiction was based are not as strong nor as numerous as in the case at bar. It was said in that case; see (89 Fed. Rep., *l. c.* 260):

> "The act authorized the subscription to be made in bonds * * * also the levy of the tax * * *.
>
> "This being the case, these funds are devoted to a special object, and cannot be applied to any other. In other words, they are impressed with a trust, **and that trust can well be enforced in a court** of equity. * * *
>
> "This being so, there is not a plain, adequate and

complete remedy at law, such as will prevent the exercise of the established jurisdiction in equity over a trust."

The language above used by the Court is exactly applicable to the facts in the case at bar.

The following cases are pertinent as showing that the county is not exempt from the operation of ordinary remedies in a case arising out of a contractual obligation.

> "In its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the State at large, but for the private advantage of the particular corporation, as a distinct legal personality. **As to such powers, and as to the property acquired** thereunder and contracts made with reference thereto, the corporation is to be regarded '*quoad hoc* a **private corporation**'."
>
> S. I. W. & C. v. Baltimore, 66 Fed., *l. c.* 144;
>
> Ill. T. & S. Bank v. City of Ark. City, 76 Fed. Rep., *l. c.* 293.

Further, upon the question of whether a tax fund created to be used for a specified purpose is a trust fund over which equity and federal equity courts have jurisdiction, in case of diverse citizenship; and whether a creditor's bill may be maintained by one of several creditors who are entitled to such fund, is conclusively settled by the case of New Orleans v. Fisher, 180 U. S. 185 (decided Oct. 12th, 1900):

> "In all these cases it is immaterial from what source the funds that constitute the trust are derived, whether from the bounty or individuals, the Crown, the State, or Legislature.

"If a trust is contemplated, and endowed with funds from any source, for a general public purpose, it will be regulated and controlled by a court of equity, upon proceedings instituted before it."
School Trustee v. Hoboken, 70 N. J. Eq. 630.

That a fund to be created by taxation in aid of a railroad is a public use, and within the statute of charitable or public uses is settled by Roberts v. N. P. R. R. Co., 158 U. S. 1 (*l. c.* 17), and by

Town of Darlington v. Atlantic Trust Co. (Ct. of Appeals, 4th Circuit, 68 Fed. Reporter 849), and cases there cited.

"Sir John Leach expressed himself to be of opinion that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift from any legal, public or general purpose, are charitable funds to be administered by courts of equity."

* * * "If the Crown being entitled to tolls grants them to a charitable use, they are subject to all the incidents of other property so granted."
Atty.-General v. Corporation of Shrewsbury, 6 Beavan Reports in Chancery 220.

It was said in Women's Christian Ass'n v. Kansas City, 147 Mo. 124:

"Such powers (control over trusts) are a part of its (that court's) equity jurisdiction over trusts and charities, and were exercised long before and independent of the enactment of 43 Eliz. Ch. 4. **A trust without a power in equity to enforce it would not be a trust,** if that expression of it be permissible. Appellants concede that our equity courts could enforce a trust by commanding the trustee to act; by removing him and approving a successor

> under proper circumstances, and by ordering the execution of it after the death of a trustee."

The fact that Kansas City, a municipality, was the trustee did not interfere with the exercise of control over the trust by the Missouri Supreme Court. The trust was enforced against Stanley County, North Carolina, in Coler v. Board, 89 Fed. 257 and 190 U. S. 437, and this is the latest case in point decided by the Supreme Court of the United States.

It is distinctly held in a number of cases that where bonded indebtedness had been created prior to the adoption of the present revenue laws of a state, the new revenue laws, if they abridge or limit the right of the creditor to a full remedy, have no application—because void as impairing the obligation.

It is constantly recognized in all of these decisions by the Supreme Court of Missouri that it is the **judgment** establishing the obligation, concurring with the duty at the time of the creation of the liability to levy a tax for payment, which gives potency and effect to the obligation upon the respective taxpayer to respond to his proper proportion thereof. As said in State *ex rel.* Hamilton v. H. & St. J. R. R., 113 Mo., *l. c.* 305:

> "We must presume then that bonded indebtedness of this township was created prior to the enactment of said section 6799, and **therefore** the statute and the conditions and **limitations** therein provided for making levies to raise taxes to pay principal and interest on township aid bonds **has no application to the bonds in question.**" See also State *ex rel.* Scotland Co. v. Ewing, 116 Mo., *l. c.* 135.

SEIBERT v. LEWIS, 122 U. S. 284.

The **effect** of the decision in Seibert v. Lewis is that where the United States Court has jurisdiction over the subject-matter, and power to make a decree, **it has power to designate the officer to perform it,** for it is held in that case that the original means of paying the obligation, that is, the method of levy of tax and designation of property upon which the tax should be laid, was part of the contract; that the Legislature could not substantially change this without violating the contract, **that an officer of the county, although not elected to perform that duty, and although positively prohibited from doing it by a statute of the State, MUST PERFORM IT. Now is this not a designation BY THE COURT** of the **person to perform the duty?** The Court said:

> "His (the creditor's) contract is not only that he shall have as good a remedy as that provided by the terms of the contract when made, but that his remedy shall by means of **a tax,** in reference to which the levy and collection shall be as efficacious as the State provides for the benefit of its citizens, without any discrimination against him."

From the cases above discussed it must be conceded:

That the enforcement of an order requiring the raising of a fund to satisfy a contractual obligation by taxation, when the taxation is authorized by the Legislature, and when the Legislature entrusts to the judiciary of the State control over taxation for all purposes, is not an invasion by the judiciary of the power of another department of government.

That the fact that plaintiff has established his de-

mand by a judgment at law does not destroy, but increases, his right to equitable jurisdiction, particularly when ground for equitable jurisdiction does, under the facts and the decisions before reviewed, exist.

Equity may apply any equitable remedy.

That the State statutes in providing for enforcement of duties involving taxation by *mandamus* **or otherwise**, by providing for specific performance when *mandamus* has issued to agents of private corporations—with the rulings of the State courts that, in their business capacities, the municipalities of Missouri are subject to same rules as are private corporations, there can be no valid reason why the United States court should not, in enforcement of its jurisdiction, lawfully acquired, direct the performance of ministerial acts necessary to the satisfaction of its judgments.

The trial court cited **Rose's** notes and certain cases in denial of the right of plaintiff to specific performance. The appellant is confident that upon a critical examination of these cases by this court and a discriminating comparison of the facts in each with the facts alleged in the petition here, your Honors will conclude that **not one of the cases cited in the opinion**, in any principle declared, can be properly invoked to deny the plaintiff the relief here sought.

Meriwether v. Garrett, 102 U. S. 472:

This case is often cited upon the limitations of Federal courts in the control of powers of taxation. It is distinguishable from the case at bar in the following essential particulars:

1st. There was no trust created by authority of the Legislature in the original creation of the debt by the City of Memphis.

The bonds were ordinary obligations with no **express**

power **granted by the Legislature to levy taxes for the payment therefor,** and therefore no definite trust created. In this case the trust is definite, the power express, the requirement imperative.

2nd. In the Garrett case, the Legislature of Tennessee repealed the charter of Memphis, remanded the territory and inhabitants thereof to the Government of the State, and assumed the power of taxation to pay such obligations as its own officers might thereafter, under the machinery provided, determine to be obligations, and was proceeding with that duty when the Federal Court interposed.

In the case at bar, the State of Missouri has, according to the construction of the act of 1879 by the Supreme Court of the United States and followed by the Supreme Court of Missouri, never withdrawn the requirement to levy the taxes and has never in any way interfered with the trust created, but the agent of the municipality refuses to perform.

The first sentence of Clause 4 of C. J. Waite's opinion, in Merriwether v. Garrett, *l. c.* 501, makes a plain distinction:

> "Taxes levied according to law before the repeal of the charter, **OTHER than such as were levied in obedience to the special requirements of contracts entered into under the authority of law** and such as were levied under judicial direction for the payment of judgments recovered against the City, cannot be collected through the instrumentality of a court of chancery at the instance of the creditor of the City."

Note the distinction so carefully made by the court above.

The taxes which **can** be levied through the instrumentality of a court of chancery at the instance of the creditor of the City, are stated, **BY PLAIN INFERENCE,** to be

> **"those levied in obedience to the special requirements of contracts entered into under the authority of law,** and such as were levied under **judicial direction** for the payment of judgments recovered against the City."

Continuing, the opinion states (and **not** referring to those required to be levied by contract):

> "Such taxes can only be collected under authority from the Legislature. If no such **authority** exists, the remedy is by appeal to the Legislature, which alone can grant relief. **Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged by the Legislature to perform that duty, is not decided as the case does not require it."**

In the case of Merriwether v. Garrett, **the receiver appointed by the Federal Court below** was vested by the order with the administration of the financial affairs of the City, so far as might be necessary for the collection of taxes and debts and **disposing** of the property of the City to pay the claims of creditors.

Executive and administrative functions were invested in him which, it had not been supposed, could adequately be performed by the same person in any government of a city property conducted (*l. c.* 510). These, despite the fact that the State of Tennessee was then proceeding with its scheme for the adjustment of

these liabilities and the officers of the State were performing their duties to the full.

This case at bar bears no resemblance to that.

The relief prayed for here would interfere in no manner with the general affairs of the county, and with no executive or administrative function not purely ministerial.

Again, on page 513 of that opinion, the distinction between general taxes, and taxes imposed by legislative authority in performance of valid contractual obligations, is again emphasized by the clause: "* * * **In the absence of statutory authority they cannot be subsequently collected by a court of equity through officers** of its own appointment, and applied to the creditors of the corporation."

This clause, by implication, supports our contention, which is directly supported by the cases we cite, that a court of equity **can, where the statutory authority exists for the imposition of taxes** in payment for contracts for which tax was created, collect the same through officers of its own appointment and apply the same to the creditors of the corporation.

And, again, this distinction is made (*l. c.*, page 514):

> "* * * there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, **that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support** of the government, or to meet some special expenditure; and **these**, until collected, being mere imposts of the government created and continuing only by the

will of the Legislature, have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation."

The case of Heine v. Levee Commission (1872), reported in 1st Woods, p. 246, is quoted by C. J. Waite, but an examination of that case shows, beyond question, that Judge Bradley refused equitable jurisdiction and specific performance in the Heine v. Levee Commission's case, upon the express ground that **no judgment had been rendered at law and no mandamus previously asked for at law.** In fact, Judge Bradley expressly said:

> "**What the Court would do on a creditor's bill filed after judgment at law, to aid the complainants in obtaining satisfaction, is not now the question.** Whether, if every effort to get an assessment made, should fail, the Court would put forth its hand and find a remedy, or whether further legislation would be necessary to enable it to do so, I am not called upon to decide."

The case of Heine v. Levee Com. was affirmed by the Supreme Court of the United States, 19 Wallace 655, by a divided court, Mr. Justice Miller rendering the opinion and indulging in expressions which, in the light of other decisions and considering the point actually involved, can be considered only as *dicta*.

The case of Meriwether v. Garrett is no authority against the proceeding sought here, for the facts are entirely different, and the reasoning of the Chief Justice must be considered only with respect to the facts in that case. Even upon that state of facts, three dis-

tinguished jurists, Strong, Swayne and Harlan, dissented, and in most vigorous language, and supported by undoubted precedents which they cited, attacked the language of the majority opinion. The dissenting opinion emphatically declares (and it is to be noted that nothing in the majority opinion contradicts the proposition stated below, which is applicable to this case, whether or not it was to that case, because in the case at bar **the trust was created by the Legislature**).

> "The taxes which it was the duty of the City as Trustee, to collect had been suffered to remain uncollected in great measure, and for an unreasonable time, and even the portions which were collected had not been paid over, as the writs of *mandamus* required. This breach of duty **by the trustee** had continued from 1875 to 1879. Had the trustee been a natural person, or a private corporation, **no one would doubt the power of a court of equity to interfere and take the trust out of the hands of the faithless trustee, either by removing him and appointing another trustee, or by administering the trust** by its own **officers. It can make no difference that the City of Memphis was a municipal corporation. Its character as such does not affect the nature of its obligations to its creditors, or its cestui que trust, or impair the remedies they would have if the city was a common debtor or trustee.**
>
> "While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or **in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons.** Over its public duties, it may be admitted the Leg-

islature has plenary powers. Over its private obligations it has not."

If the learned judges could thus declare that the Legislature of Tennessee had no plenary power to defeat the trust or to interfere with the powers of equity in the enforcement of such a trust, what can be said for the proposition, advanced by the defendant, that the **petty agents of the municipality** may practically nullify the power of both the Legislature of Missouri and this Court when the power of both is conjoined in the attempt to enforce this trust?

The opinion of the minority clearly holds, *l. c.* 533, that "embarrassments thrown by a statute in the way of enforcing payment of a debt, or a statutory substitute for the obligation and liability of the debtor, **of the will** of **some other person**, though that person be a State, have not heretofore been recognized as consistent with the Constitution" (referring to the provision in the U. S. Constitution protecting against impairment of the obligations of a contract). "The protection afforded by its provisions and its prohibition of certain State legislation relate, **not to the mode and form of State statutes, but to their operation and effect.**" It is respectfully submitted that if the great State of Missouri cannot, acting through a combination of all of its agencies of sovereignty, to-wit, the Legislature, Governor and judiciary, impair the obligation to have these taxes, once lawfully authorized, applied to the payment of contracts created in reliance thereon, it would be, and is, preposterous for the defendant to set up any claim that the agents of this municipality may do so, when the state does not attempt it.

Thompson v. Allen, 115 U. S. 550 (1885).

This opinion was rendered by Justice Miller. His habit of thought was that of the early zealots of the State's Rights School, as shown in many opinions. His reasons are proven obsolete by scores of cases since. Thompson v. Allen is the strongest authority that may be cited against our position. This decision is criticised by Mr. Justice Harlan, in the dissenting opinion, and the futility of the reasoning of Mr. Justice Miller is ably shown by Judge Harlan, but Thompson v. Allen, strong **as the language of Judge Miller is**, may be distinguished from the case at bar, in these **vital** particulars:

1st: It does **NOT** appear in Thompson v. Allen that the Legislature had exercised or directed the taxing power for the benefit of the creditor.

In the case at bar the Legislature has exercised the taxing power, has commanded the duties, and required their performance.

2nd: It does not appear in Thompson v. Allen that the Legislature had committed to the judiciary the duty of enforcing the taxing power for the benefit of the particular creditor.

It **DOES** appear in this case that the Legislature has committed to the judiciary that duty.

In the **Thompson v. Allen case, no specific trust created by the Legislature was alleged, no creditor's bill involved, no legislative authority shown for the creation of the tax fund, no basis fixed for the levy of a tax, no commitment by the Legislature to the judiciary of the duty of enforcing the tax, and no original ground for equitable jurisdiction.** The language of Justice Miller that chancery courts had never exercised any control over the taxing power is proven incorrect by

hundreds of instances where the Federal Court exercises the right to enjoin the imposition of unauthorized taxes. The statement that the Chancery Court had never appointed a receiver for taxes is shown to be incorrect by the ancient chancery precedents before referred to herein, but even had Judge Miller's statement as to the ancient powers of chancery been correct, the **language would have no relevancy to a case arising where the taxing power, to-wit, the Legislature, in a given State had lawfully committed the enforcement of duties connected with the taxing power to the judicial power, as has been done in Missouri.** Thompson v. Allen County case involved the construction of laws of the State of Kentucky, where the Supreme Court of Kentucky had held that the power to impose taxes was legislative and could not be confided to a judicial tribunal, under the Kentucky Constitution. In Missouri, in the case at bar, the tax has been imposed by the Legislature, and the duty of enforcing it has been confided to the judiciary by the Legislature, and the Missouri Supreme Court has held that such duties may under the Missouri Constitution be confided to the judiciary. See statutes before quoted and State *ex rel.* Higgins, 125 Mo., *l. c.* 369 and 364.

These distinctions are **vital.** The whole strength of Thompson v. Allen rests upon the proposition that the exercise of the taxing power is a legislative act. We concede this, and ask the enforcement of the legislative act already exercised, and deny the power of a petty agent to defeat it. The Legislature of Missouri has committed the enforcement of its power already lawfully exercised, to the judiciary. We ask the enforcement **under the power so conferred,** and we deny

the power of **unauthorized agents of the County to DEFEAT IT.**

The case of Seibert v. Lewis, 122 U. S. 284, holds that when the Legislature has provided for a tax and provided the means for its collection, such tax becomes a contract and that the means of payment of the contract are part of the contract and cannot be subsequently varied (if, in any particular, the variance substantially hinders the original right), because the provision of the Federal Constitution protecting the obligation of contracts is thereby involved. This principle is applicable to this case. The Legislature created this tax, the laws in force at the time of the contract for the payment of this special tax are still in force and the Legislature, having committed to the judiciary the duty of enforcement, that remedy of judicial enforcement is also a part of the contract.

The case of Walkley v. City of Muscatine, 73 U. S. 481, is no authority in this case because in that case no special authority by the Legislature to levy for the particular debt was shown, the full limit of taxation permitted by the charter of the city had been exercised and devoted to other purposes, the debt was a general obligation of the city with no power granted by the Legislature of further taxation, and particularly **no attempt had been made to compel the performance of any general duty of payment** by *mandamus*, prior to the suit in equity.

There was then **no ground** of equitable jurisdiction set up. Even the exhaustion of legal remedies as ground for equitable relief was lacking in that case. Manifestly, this case has no relevancy.

The strongest authority in the syllabus (which syllabus has had much potency in the hands of digest mak-

ers) against the power of the United States courts to enforce judgments other than by *mandamus*, is

Rees v. Watertown, 19 Wall. 107.

An examination of this much quoted case shows that the controlling factor in that case was the fact that the charter of the City of Watertown, Wisconsin, provided that: * * *

> "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold **by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city.**"

There is no such limitation as this in the case at bar. On the contrary, counties were subject to every remedy that might be applied to an individual. The statute upon **Executions,** in force at time this debt was created, exempted **only** the courthouse, jail and public buildings of a county, or other municipal corporation, from operation of such statute (see Appendix).

This provision of the charter was in force when the debt was created.

It is clearly stated in the opinion that the object of that suit was to take under execution, upon the judgment against the city, property of the inhabiants—upon the theory that **each was liable for the whole debt of the city!** It is pointed out that the Legislature of Wisconsin made no provision for a levy of taxes to pay the bonds issued and that the bondholder took the bonds with notice of these limitations, and that the duty to levy a tax was therefore a moral duty only—the performance of which a court of equity could not require. What analogy is there between that case and this?

In commenting upon the difference between the facts in Rees v. Watertown and those in Supervisors v. Rogers (which case of Supervisors v. Rogers is in no way qualified or overruled, but rather approved by this language), Mr. Justice Hunt emphasized that in the case of Supervisors v. Rogers, **the duty of levying the tax was laid and enjoined upon the Board of Supervisors by the Legislature of the State of Iowa, and that the Marshal of the United States Court**, in performing the ministerial duty of levying the tax, was but **performing the duty of the Board** when the Board had **disobeyed and evaded the law of the State and the peremptory mandate of the Court**. He points out, as above stated, that in the Rees v. Watertown case the Legislature of Wisconsin had not provided for a levy of a tax to pay the bonds issued by the City of Watertown.

In the case at bar the **Legislature** has authorized the levy and has commanded the agents of the county to make it.

If the agents of the county **should obey** the mandate of the Legislature and the former orders of this Court, the result would be identical with that sought by this proceeding. Is the Legislature and the Federal judiciary alike impotent against the willfullness of those petty agents of a petty corporation? Is the jurisdiction and power of the United States in the protection of property rights of citizens of other states to be thus nullified and destroyed!

Even though the Legislature should by name direct these agents to perform, and the power to make such special direction should be sustained by the Supreme Court of the State, the present Constitution prohibits the enactment of special laws), would the Federal Court have any more power than, as shown by the prec-

edents above and Rule No. 8, it already has?

Is not the essence of equity jurisdiction the principle that equity regards the substance and not the form?

As said in Dillion on Municipal Corporations:

> "**It is settled beyond question** that all **duties** relating to the levy and collection of a **tax** for a public purpose **where a contract with a creditor is involved and when the duties have been prescribed by the Legislature** are within judicial control, and jurisdiction otherwise existing, within **judicial control of the Federal Courts.**"
>
> Secs. 1488-9, Dillion on Municipal Corporations.

As to the right to maintain this action in equity (independently of any particular remedy which may be applied in the collection of the assets), there are, at least, five distinct grounds of equity jurisdiction set up in the bill, upon all of which the bill should be sustained:

1st. It is a creditor's bill, and all of the judgment creditors have a common interest in the special tax.

Davis v. Corbin, 112 U. S. 40;
Gibson v. Shufeldt, 122 U. S. (*l. c.* 38).

As respects authorized and valid contracts a municipal corporation stands upon the same footing as a private corporation.

Broughton v. Pensacola, 93 U. S. 266;
Shapleigh v. San Angelo, 167 U. S. 646.

2nd. The tax dedicated by the Legislature to a special purpose is a trust fund.

Opinion of Justice Strong in Garnett v. City, 5 Fed. Rep. 860, citing Gerard v. Phila., 7 Wallace 1, and 18th Wallace 154;

Ray Co. v. Bentley, 49 Mo. 236;
Dickson v. Co. Court, 128 Mo. 427;
Tompkins v. L. R. & F. S. Ry., 15 Fed. 6;
Holt Co. v. N. L. Ins. Co., 80 Fed. Rep., *l. c.* 690;
Washington Co. v. Williams, 111 Fed., *l. c.* 816;
Warner v. New Orleans, 87 Fed. Rep. 829.

3rd. In order to avoid a multiplicity of suits. A common fund is involved to which all may resort, and because one proceeding may result in common benefit, and because a multiplicity of suits would be necessary at law for even one creditor to obtain his rights, and having recovered the fruits, others might then claim equitable distribution, equity has jurisdiction to avoid this multiplicity of suits.

Oelrichs v. Spain, 15 Wall. 211 (82 U. S., *l. c.* 288);
Davis v. Corbin, 112 U. S. 40;
Gibson v. Shufeldt, 122 U. S. (*l. c.*) 38;
Pomeroy's Equity Jurisdiction, 1st Edition, Vol. 1, Sec. 656.

4th. Because complicated accounting is involved, which is a ground for equitable jurisdiction.

Pomeroy Equity Jurisdiction, Sec. 931;
Street's Federal Equity Practice, Section 652.

5th. Because of the inadequacy of the legal remedy.

Boyce v. Grundy, 3 Peters 210 (*l. c.* 213);
McDaniel v. Bee, 37 Mo. 204.

As said in Schmidt v. West, 104 Federal Reporter (*l. c.* 274):

> "It may well be doubted whether a remedy at law can be adequate, which cannot be used until the wrongdoer sees proper to put the machinery of the law in motion."

To **oust equity**, legal remedy must be as efficient in law as the remedy in equity.

Walla Walla v. Walla Walla Water Co., 172 U. S. 12.

To refuse equity jurisdiction there must be no symptom of equity.

Clark v. Wooster, 119 U. S. 326.

Street's Federal Equity Practice says, Sec. 52 and following:

> "Although the demand arises from the breach of a legal contract, if any trust is alleged, and in addition to the recovery of the money, the plaintiff seeks to enforce the trust, or where the controversy involves the rights of different persons, or is otherwise too complicated for law, then equity has jurisdiction. As no destruction of right of trial by jury **is involved, there can be no question about it.**"

Jurisdiction once attaching all equitable remedies will follow:

City of Centerville v. F. T. & G. Co., 118 Fed. Rep., *l. c.* 337-8;
Taylor v. Ins. Co., 9 How. 390;

and in enforcement of trusts, equity has power to substitute new trustees.

May v. May, 167 U. S. 310;
Brandon v. Carter, 119 Mo. 572.

The fund **to be raised** by the levy of the tax authorized by the Legislature is a **trust fund**. A provision for the payment of the bonds is primarily a security for those holding the bonds. It is always so in equity; and at law, when its forms permit.

Tompkins v. L. R. & F. S. Ry. Co., 15 Fed. Rep. 6.

Judge Sanborn's opinion in Washington Co. v. Williams, 111 Fed. Rep., *l. c.* 816:

> "The officers of the county are the mere hands of the court—the mere ministerial officers upon whom the duty has been imposed of taking the amount owing under the original judgment of *mandamus* from the taxpayers and paying it over to whom it is due."
>
> Holt Co. v. N. L. Ins. Co., 80 Fed. Rep. 686 (*l. c.* 690).

As to the validity in equity of charges created upon property not in being at time of contract, but to subsequently arise see

> Mitchell v. Winslow, 2 Story's Reports, *l. c.* 644;
> Pennock v. Coe, 64 U. S. 117;
> Central Trust Co. v. Kneeland, 138 U. S., *l. c.* 419.

This particular statute has been considered so often by the Supreme Court of the United States as creating a valid contract for collection of the tax which cannot be subsequently impaired, that it is considered needless to cite further authority than the language of Mr. Justice Matthews in Seibert v. Lewis, 122 U. S. 284, to which Mr. Justice Shiras refers in Barnitz v. Beverly, 163 U. S. *l. c.* 128, as follows:

> "The Court, through Mr. Justice Matthews, held: 'That the Legislature of Missouri having by the Act of March 23rd, 1868, to facilitate the construction of railroads, enacted that the County Court should, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax to pay the interest and principal of any bond which might be issued by a municipal corporation in the State on account of a subscrip-

tion, authorized by the act, to the stock of a railroad company, which tax should be levied on all the real estate within the township making the subscription, in accordance with the valuation then last made by the County Assessor for county purposes, it **was a material part of this** contract that such **creditor should always have the right to a special tax to be levied and collected**; that the provisions contained in the subsequent enactments of Missouri, respecting the assessment and collection of such taxes, were not a legal equivalent for the provisions of the Act of 1868, and that the law of 1868, although repealed by the Legislature of Missouri, was still in force for the purpose of levying and collecting the tax necessary for the payment of a judgment recovered against a municipal corporation in the State upon a debt incurred by subscribing to the stock of a railroad company in accordance with its provisions."

And in Warner v. the City of New Orleans (May 17th, 1898), 87 Federal Reporter 829, which was a bill in equity in the nature of a creditor's bill, in no respect as strong in grounds for equitable jurisdiction as the case at bar, the Court of Appeals sustained the bill, appointed a Master, **invoked the equitable doctrine that "equity looks upon that as done which ought to have been done,"** and held that under this maxim, "The **city must therefore be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand"** (*l. c.* 834).

This case went to the Supreme Court of the United States twice, the decree of the Circuit Court as appears at page 838, 87th Federal Reporter, appointing a Master, directing an account, treating the assessments

against the property as valid, granting leave to the complainants and others in interest to further "apply to the Court for such other and further orders **as may be necessary, from time to time, to carry this decree into full effect**" and was finally "**affirmed IN** all respects" **by the Supreme Court of the United States** on January 15th, 1900. See New Orleans v. Warner, 176 U. S. 92.

The discriminating examination of the precedents will disclose apt illustrations and exact applications of the **principles** sustaining this bill. As said in Ashby v. White (1 English ruling cases 523), more than a century ago (and the language is still pertinent and applicable in the United States).

> "The law of England is not confined to particular precedents and cases, but consists in the **reason** of them, which is much more extensive than the circumstances of this or that case."

It is, we think, settled by the decisions cited, that the facts alleged show this to be a case wherein the jurisdiction of equity is inherent. While in the exercise of the powers conferred and duties imposed upon the Federal judiciary of protecting the contractual rights of citizens of other states, the Federal Court is not bound by any limitations or abridgment of its powers by state courts; and, if on the question of the proper exercise of judicial power, the **State has held** that the judicial power may be freely exercised to **certain ends,** then the exercise of such judicial power may certainly be had, without infringing any alleged right to exemption from interference. Under the decisions of the state courts, equity may control the exercise of the taxing power in accordance with the purpose provided

by the Legislature. The Legislature has specially entrusted its judiciary with control over the taxing power and at any and every stage of a tax proceeding, when substantial property rights are affected, any one interested may resort to equity. In addition, this power has been conferred upon the judiciary by statute and the enforcement of duties ordered to be accomplished by "*mandamus* **or otherwise**". Therefore the contention that this suit is, in effect, a suit against the State, when contractual rights are involved, when the State judiciary exercises control over all matters of taxation in equity at the suit of any one having a particular interest, should, we respectfully submit, receive no consideration whatever.

The facts alleged in the petition present a case in which the jurisdiction in equity is inherent; under the decisions of the State courts of Missouri, the exercise of this jurisdiction is not an unauthorized interference with the taxing power; the defendant county and its agents cannot claim any exemption from control upon the ground that this suit is, in effect, a suit against a State, for the State has declared that these agents are not a part of the State's government, as such powers are divided under the State Constitution; and the State has, by law, required the duties to be performed. The enforcement of these duties is not an unwarranted exercise of judicial power, for the State Legislature has committed to its judiciary the power of enforcement of such duties.

Under such conditions can the application of rule 8, compelling specific performance of a decree which this Court has the right to make, be denied?

The right to so compel the performance is not only clear under rule 8, but the right might and should be

exercised under the provision of the State statute conferring upon Circuit Courts of the State the duty to enforce its orders regarding taxation, by *mandamus* **or otherwise.**

As said in Holland v. Challen, 110 U. S. 24:

> "While it is true that alterations in the jurisdictions of State courts cannot affect the equitable jurisdiction of the Circuit Court of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State, and it may be affirmed of this case, what was said as probably true of that one (21 Wall. 520), that it is a case in which an **enlargement of equitable rights is effected,** although presented in the form of a remedial proceeding. Indeed, as the Court there observed, much of equitable jurisdiction consists of **better and more effective** remedies for attaining the rights of parties."

In Davis v. Gray, 16 Wall. 203:

> "A party by going into a national court does not lose any right of appropriate remedy of which he might have availed himself in the State courts of the same locality."

As said in Toledo, Etc., Ry. Co. v. Penn. Co., 54 Fed. Rep. 751:

> "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to one party, without im-

posing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor, to meet the constantly varying demands for equitable relief."

Mr. Justice Brewer, sitting in the Circuit Court for Nebraska, said:

"I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand."

Upon the exercise of control by the judiciary of administrative officers generally, the case of Roberts, Treasurer, v. United States, 176 U. S., *l. c.* 231, clearly states what duties are ministerial, in this language:

"If the law direct him to perform an act in regard to which no discretion is committed to him, and which upon the facts existing he is bound to perform, then that act is ministerial" * * *

And upon the conditions now existing, the language of Chicot Co. v. Sherwood, 148 U. S., *l. c.* 534, becomes pertinent:

"The courts of the United States are bound to proceed to judgment and to **afford redress to suitors before them in every case to which their jurisdiction extends.** They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

Anticipating the objections that may be raised in defendant's brief. As there may be no opportunity to reply to the brief of the defendant in this controversy,

the plaintiff here reprints his reply brief in the court below:

GROUNDS OF APPELLEE'S OBJECTIONS.

What, then, are the grounds set up by the appellee for its claims of exemption from the operation of general rules of equitable procedure? For what reason should it escape payment? What are the grounds of immunity from control by which it defies the Federal court and deprives the creditor of redress? We gather from appellee's brief the following, which we believe states the essence of these claims of exemption and immunity from control:

1st. That equity cannot in this case exercise its acknowledged jurisdiction over trusts, because, appellee says, there can be no trust, and no trust fund, until the fund is actually collected!

If appellee is wrong about this, then equity surely has jurisdiction and all remedies known to equity may be applied.

2nd. That because, forsooth, *mandamus* might be an effective remedy if it had been obeyed, plaintiff is limited to the issuance of a writ **commanding** the performance of the act, **AND not to the performance.** This contention proceeds upon the assumption that having obtained a common-law judgment, **no matter what other grounds of action** we may set up, in addition to the necessary one in equity that we had reduced our demand to a judgment at law, we have forfeited all right to other remedies by going into a United States Court!

3rd. While the right to "interfere" with these agents by *madamus* is conceded; while this is constantly urged by appellee as our only remedy; it is in-

sisted, that to secure the **performance** of the same act which would be performed had the writ of *mandamus* been obeyed by means other than *mandamus*, would and does constitute an invasion of the powers of the State by the Federal judiciary!

4th. The general objection that equity courts are limited in their jurisdiction. The grounds of this objection are not made clear to us in appellee's brief, at least the grounds are constantly confused. The point that Congress has granted no power to Federal courts to control political powers of other departments, or to direct officers of other departments in matters of discretion, are undoubted; but this has no relevancy to the control over ministerial acts of minor officers who are violating the laws of the State in denying private rights of litigants who are under the protection of the United States courts. The contention that the equity court should be denied jurisdiction because such jurisdiction would be an improper exercise of judicial power can have no force where the right of the law court to order the same act is conceded—for as an exercise of judicial power, if objectionable at all, it would be just as objectionable if the act were performed by the law side as it would be on the equity side. The objection that the action sought is an invasion by the judiciary of the powers of other departments of the State can have no force when the judicial power of the State is charged with that duty. The point that neither equity nor law can levy a tax because such an act would be an interference with the power of the Legislature can have no relevancy to the facts of this case **for the Legislature has already performed all of the acts which it can perform in authorizing the levy of the tax.**

Taking these objections up in the order above stated:

A.

That the fund to be raised cannot be a trust fund; that until the fund is collected there is nothing to which the jurisdiction of equity can attach, we reply: The charge upon the property authorized to be imposed by the Legislature is definite and certain and constitutes a trust fund in equity. The fact that it is not available, or subject to execution at law, and that it is so unavailable at law is **by reason of the omission of a duty by the agents of the defendant**—such duty being specifically charged by the law under which said agents hold office, the omission to perform, instead of being a ground for the denial of equity jurisdiction, is an additional ground for the interposition of equity, for such omission to perform the duty is a fraud upon plaintiff.

The Legislature created a lawful charge upon certain property for the use and benefit of certain creditors.

This was a trust under the Statute of Elizabeth. It was also a contract that the fund would be raised. To say that the persons charged with the collection of a fund which shall be applied to a definite purpose are trustees after they collect the fund, but are not trustees when they refuse to collect it, is to mock at justice, and would make the majestic administration of law a farce for the common sense of the age to laugh at. As said in Case v. Beauregard, 101 U. S., *l. c.* 688:

> "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his legal remedies."

(Here we have exhausted our legal remedies.)

Continuing, the Court says:

> "When a bill asserts a lien or a trust and shows it can be made **available only by the aid of a chancellor, it, obviously,** makes a case for his interference."

The case at bar is, palpably, such a case.

The case of Pendleton v. Perkins, 49 Mo., page 565, is an illuminative decision upon this question. It had been held in Missouri that towns and cities could not be garnished for a sum due an officer as part of his salary. This, upon the ground of public interest. Subsequently a statute was passed expressly exempting municipal corporations from the operation of the garnishment act. Upon a bill being brought in equity to compel the City of St. Louis to pay Pendleton a debt due him from Perkins, charging that Perkins had absconded so that judgment could not be obtained against him and that there was money in the city treasury due Perkins, such a bill in equity was sustained.

The whole ground of equity jurisdiction, independently of statutes, is reviewed in this decision and the right and power of courts exercising ancient chancery jurisdiction to subject property to charges which the law cannot reach is there upheld. The Court says (*l. c.* 567):

> "The affirmative of the proposition that a judgment creditor who has exhausted every ordinary means to satisfy his judgment, should have the aid of the Court, **in analogy to its ancient chancery jurisdiction to reach his debtor's funds,** whether fraudulently concealed or not, seems to be necessarily inferred from the main object of chancery

jurisdiction—to furnish a remedy when the strict rules of legal practice fail."

And further, at page 568:

> "In most of the cases above cited fraudulent practices were charged upon the debtor, as they are in a general way in the case at bar; but I have chosen to consider the question as divested of that element further than it adheres to all cases where a debtor possesses a fund from which he can satisfy his creditor, **but absconds without having done so.** This is in itself fraudulent, in a sense, although no conveyances may be made or other contrivances resorted to with design to cheat and defraud."

And the Court in that case in equity applied, by analogy, all of the effects of a garnishment proceeding against the great City of St. Louis, although an ordinary garnishment at law was prohibited by statute!

The fund to be raised is definite and certain. The property, that is, the taxable wealth of Dallas County is *in esse*, is made subject by the Legislature to this charge, and there is no more reason for denying jurisdiction over the fund in this case than there would be to deny jurisdiction of equity to appoint a receiver for a private corporation whose sole assets consisted of claims against individuals which it had not collected and reduced to money. As said in Ager v. Murray, 105 U. S., *l. c.* 129:

> "It is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, **WHICH BY REASON OF ITS NATURE ONLY**, and not by reason of any

positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest of shares in a corporation, or of choses in action."

And in this case a two-thirds interest in a patent right was subjected in equity to payment of a general judgment against the debtor, the interest was ordered sold, an assignment was ordered to be executed by the debtor to the purchaser at the sale and upon failure to execute the assignment, a trustee was appointed by the Court to execute a proper assignment to fit the patent laws requiring transfers of patents to be formally recorded to be effective to vest interest in assignee.

Cutting v. Dana, 25 N. J. Equity, 265.

Affirms right of courts of equity to enforce specific performance of contracts for chattels.

Tayloe v. Merchants F. I. Co., 9 How. 50, U. S., *l. c.* 405.

Sustained a contract for an insurance policy, the right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss, and under the prayer for general relief remanded the case to the lower court to give such final relief as the circumstances of the case demand.

B.

Replying to the objection that we are confined to the remedy by mandamus—to the issuance of the writ and not to its enforcement.

The appellee repeats at length in his brief the language used in cases referred to and distinguished in

appellant's brief. It is one thing to issue a *mandamus* to command the exercise of discretion; it is quite another thing to issue a specific order directing the specific performance of an act—whether such order be called a *mandamus* or a mandatory injunction, or what not. If the power of the Court is limited to a mere command to exercise discretion—which would be the case where a debt had been created by a municipality without the express authority for the creation of the debt and for the levy of a tax to pay it, the power of the Court might be limited to a mere command to the municipality to exercise its discretion to provide or not to provide for the payment of the debt. The language that the Court has no power other than to issue such a writ is not applicable to cases where the Legislature has authorized the creation of the debt, commanded the levy of a special tax to pay the debt and has charged the judiciary of the State with the duty of enforcing all rights under a contract so entered into.

It is said in Pomeroy's Eq. Jurisprudence, Sec. 328, Eq. Remedies, Vol. I, 1905:

> "Where no question of discretion is involved, both law and equity will interfere without hesitation. It is generally stated that *mandamus* may issue in a proper case to **compel the performance of a ministerial act**. The corresponding statement as to injunctions is that it may issue in a proper case to restrain an act in excess of the officer's authority."

Whether *mandamus*, or a mandatory injunction be issued is but a matter of form.

The power of this court to issue *mandamus* exists only because it is one of the writs which may be used to

enforce its jurisdiction. The object of *mandamus* is to compel the specific performance of the act.

The authority is, **not to issue mandamus**, for that has not been specifically provided for by statute of the United States, but

> **"To ISSUE ALL WRITS NOT** specifically provided for by statute, which **MAY BE NECESSARY FOR THE EXERCISE OF THEIR RESPECTIVE JURISDICTIONS, AND AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW."** (Sec. 262, Judicial Code.)

This court is not confined in its remedies to the statutes of Missouri, but the fact that the Legislature of the State of Missouri commanded the judiciary to **enforce the specific performance of all rights and duties connected with the LEVY AND COLLECTION OF THE TAX AND PAYMENT TO THE CREDITOR, conclusively shows that any writ,** proceeding or remedy used by the United States Court to **compel the specific performance of these acts, would** be agreeable to **THE USAGES AND PRINCIPLES OF LAW** and particularly when facts necessary to constitute a cause of action in equity is set up and when the remedy is analogous to that which has been applied under ancient chancery practice.

The law in force at the time of the passage of the act authorizing the creation of this debt authorized a proceeding by *mandamus* against any County Court refusing to perform any of the duties required to be performed. To what end, for what purpose was *mandamus* to be issued? **To compel the specific performance of the act,** of course.

Subsequently the Legislature in committing to the

judiciary of the State the power to enforce its orders upon the County Court added the words by "**mandamus or otherwise**".

Now it is of no consequence whether the particular tax in controversy here was mentioned in this authority by the Legislature to the judiciary to enforce performance of duties with relation to taxation by **MANDAMUS OR OTHERWISE**. The point which appellant insists upon, and which it appears appellee seeks to evade, is:

That the power to enforce specific performance of duties connected with taxation is conferred upon **the judiciary of the State by the use of the writ of mandamus or OTHERWISE**—the object being to secure **specific performance**, and there can therefore be no objection made that any writ issued by the United States Court which may be necessary for the exercise of its jurisdiction is not "agreeable to the usages and principles of law" if similar action in like causes is had in the State Court.

The real objection, if any, which appellee can raise must rest upon the contention that the proceeding sought is not agreeable to the usages and principles of law. We insist that when the State adopts a similar proceeding in like causes, as it has done, then no objection can be made, for the action by the State shows that the remedy by **MANDAMUS or OTHERWISE** to enforce specific performance of these duties **is** agreeable to the usages and **principles of law**.

We think there is no necessity for multiplying authorities to controvert appellee's contention that because we had heretofore reduced our debt to judgment in a common-law cause we are limited in our remedies to similar remedies as are now provided in like causes

by the laws of the State in which such court is held, but in "**like causes**", under the laws of the State of Missouri, we are certainly entitled to **specific performance** of all of the duties necessary to the imposition of this tax, its collection, and devotion to payment of this judgment by "**mandamus** or **OTHERWISE**".

Sec. 11417, R. S. Mo., page 30, appellant's brief.

The language of Sec. 262, Judicial Code, is "agreeable to the usages and **principles of law**". The word law is here used in its broad sense, including law and equity. As said in Hills v. Hoover, 220 U. S. 335-7:

> "The courts of the United States are not restricted to the kind of processes used in the State courts, or bound to conform themselves thereto in all respects, but have the authority to alter the process in such manner as may be deemed expedient and **TO SO ADAPT IT THAT ITS EFFECT AND OPERATION MAY BE EFFECTUAL.**"

And, as said in Bank of U. S. v. Halstead, 10 Wheat. 53:

> "The authority to carry into complete effect the judgments of the courts necessarily results, by implication, from the power to ordain and establish such courts."

Which last case expressly holds that no limitation to common-law writs was intended.

And, upon the point of enlargement of the objects of the application of equitable remedies, Pomeroy says, Sec. 375, Eq. Remedies, Vol. I, Pomeroy's Eq. Jurisprudence (1905):

> "When the Federal court acquires jurisdiction of the case and facts are shown which, under the

State law, warrant the issuance of an injunction, such relief may be awarded, whether the facts are such as ordinarily warrant such relief, in Federal courts or not."

C.

To the objection that this action "interferes" with the powers of the sovereign State of Missouri, the language of the Supreme Court of the United States in the Virginia coupon cases, 114 U. S., *l. c.* 295, is conclusive:

> "The true and real commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it.
>
> "Whatever having that effect, if operative, has been attempted or done is the work of its government acting without authority in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not, and never had been. The State of Virginia has done none of these things which this defense charges her. **The defendant is not her officer, her agent, or her representative,** in the matter complained of, **FOR HE HAS ACTED NOT ONLY WITHOUT HER AUTHORITY, BUT CONTRARY TO HER EXPRESS COMMANDS. THE PLAINTIFF IN ERROR IN FACT AND IN LAW, IS REPRESENTING HER, AS HE SEEKS TO ESTABLISH HER LAW, AND VINDICATES HER INTEGRITY AS HE MAINTAINS HIS OWN RIGHT.**"

The Court in that case quotes approvingly, *l. c.* 298:

> "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high

appellation if the laws furnish no remedy for the violation of a vested legal right."

The appellee treats as irrelevant all of the statutes of Missouri which confer upon the judiciary the power to appoint substitutes for the ministerial officers charged with the performance of the necessary ministerial acts to effectuate this fund.

These statutes illustrate the principle that there is no vested right to the performance of a duty enjoined by law upon a ministerial officer **when he refuses to perform the duty.** It is no interference with the powers of the State when the act is required by the State to be performed for the judiciary to direct, as it may do in Missouri, the performance, by a substitute—an officer of the court, under such circumstances. Is it not obvious that specific performance is no more an "interference" even with the affairs of this country than a specific *mandamus*, or a mandatory injunction would be, if obeyed?

Is specific performance of an act required by the law to be done, any more of an interference than an injunction restraining the levy and collection of an unlawful tax? If an injunction may be issued at the suit of a taxpayer restraining the imposition of an unlawful tax for the benefit of the creditor, is there any reason why the creditor should not have the aid of equity to enforce the levy of an **authorized and lawful tax?**

Is not one as much an interference as the other?

D.

Replying to the objection that equity has no jurisdiction:

We have shown that Federal courts are constantly interfering by injunction and otherwise with the imposition of taxes at the suit of any one interested; that when a tax should be levied to fulfill a contract obligation and where the levy of the tax has been authorized by the taxing power, equity anciently exercised jurisdiction, that the cases wherein equity denied jurisdiction were cases where no tax had been authorized by the taxing power, *i. e.*, the Legislature, or no first resort had been had to *mandamus*, and, of course, the agent charged with the duty should first have an opportunity to perform his duty. It was said in Antoni v. Greenhow, 107 U. S. 781, in speaking of *mandamus* in aid of execution: "*Mandamus*, in this class of cases, is in the **nature of a suit to enforce the specific performance of a contract.**" Of course, if there is no contract to perform, no specific performance by *mandamus* or otherwise can be enforced, but when there is, as here, a specific contract to be performed, performance ordered by *mandamus* and performance defeated by the act of the agent—who in such action violates his oath of office, does the power of equity cease? Is the jurisdiction of equity dependent upon the agents of the county?

Mandamus is not, as appellee contends, an end; it is but a means to specific performance. The jurisdiction of equity does not depend, as appellee assumes, upon the will of the agents of the defendant county, nor is the power and jurisdiction of the court to enforce specific performance (which is the object of

mandamus) at once defeated and destroyed by the willingness of the agents of the defendant to subject themselves to attachments for contempt and their agility in escaping or their willingness to submit to punishment for such contempt.

Erroneous Statements in Appellee's Brief.

There are several erroneous statements in the brief of the appellee, which we believe were inadvertently, and not intentionally, made by the counsel for appellee. That they are erroneous plainly appears. Referring to the avoidance by the action herein of a multiplicity of suits, appellee says:

> "All appellant is required to do at law is to sue out a writ of *mandamus*. That other creditors may subject appellee to like writs can hardly concern appellant. Whether they will avail themselves of that right, appellant does not know. **It is certain they have not chosen to come into this case as the record shows.**" (Page 61, appellee's brief.)

It is not material to this case, at this stage (the court below having arrested any action on the part of other creditors to join in this proceeding, by his action in dismissing the petition) whether or not all other creditors will join, **but the record does show** (pp. 32 and 33, record) the appearance herein of Alexander Dempster, another, and the next largest, creditor, who holds judgments aggregating over $400,000.00 and interest (paragraph 21, page 13, and paragraph 5, page 2, record), and, for the information of appellee, appellant states that the **appellant does know** that all of the judgment creditors will join in this proceeding if the petition herein be sustained, although appellant doubts whether

other creditors will resort to the suing out of writs of *mandamus* so long as it is apparent that such writs are merely, as now, paper fulminations of a court—to be treated with contempt by the agents of the appellee.

The APPELLEE is GRIEVOUSLY IN ERROR AS TO CERTAIN STATUTES BEING IRRELEVANT (page 37, brief of appellee).

Counsel for appellee have confounded the "act concerning corporations" (certain immaterial sections of which **are excepted** from the operation of the special act chartering the Laclede and Ft. Scott R. R. Co.), with "an act to authorize the formation of railroad associations" which is **NOT** excepted from the operation of the special act chartering the Laclede and Fort Scott Railroad. The two acts contain about the same number of sections, but that the appellee is wrong, and appellant is right will appear upon cursory examination of the statutes. The statutes printed in appellant's opening brief are, we repeat, taken from the "act to authorize the formation of railroad associations and to regulate the same", being Chap. 39, R. S. 1855, commencing at page 404, Vol. I, R. S. Mo. 1855, and were in force when the special act was passed and are, therefore, a part of it.

The "act concerning corporations" is found at page 369, Vol. I, R. S. Mo. 1855, and is Article I of Chap. 34, and relates to corporations generally. The excepted provisions of this last act have no relevancy to the controversy. Counsel is in error also about these provisions not appearing in the Revision of 1865. They do appear substantially the same, pages 338 and 339, Vol. I, R. S. 1865, but it is of no consequence whether they subsequently appear or not (except upon the continuance of the authority in the judiciary to enforce du-

ties connected with taxation), **as it was the special act of 1860, together with the general law in force at that time which created the contract,** which, under many decisions, it has been held could not be subsequently impaired in any way, but the remedies for which might be enlarged.

It has repeatedly been held that the special act creating the Laclede and Fort Scott Railroad created a contract as of that date with the right of the county to subscribe for the bonds without a vote of the people and that subsequent provisions in the general law requiring a vote as a condition precedent to the issue of the bonds were inapplicable.

The law of 1870 was in force when the bonds were issued. The date of the subscription to the bonds does not appear in the petition and is not relevant to this controversy. Appellee well knows, however, that the bonds were subscribed for many months before their actual issuance.

"Submitting to jurisdiction and declaring obedience to duty."

The appellee seems to regard the incidental feature of the bill which asks (paragraph 6 of prayer, page 16, Record) that certain officials of the defendant county be required to personally appear and submit to the jurisdiction of the Court, or, perhaps, the avoidance of it, as of primary importance, for this is the first point to which they address themselves in their brief. As the defendant is a corporation which must act through agents, and as the agents who are making the defense for the county are the attorneys who are not required to do any of the acts and as many of the agents, other than the attorneys, are in contempt of the court below, the prayer is neither unreasonable,

nor so unprecedented as the appellee conceives. An attachment was ordered to be issued, as shown in U. S. v. Judge Peters, 5 Cranch. 115, when the Legislature of the State of Pennsylvania had commanded the Governor of that State to call out an armed force to prevent the execution of any process to enforce performance of a sentence. See note, page 115, and pages 135 and 141, and old precedents are numberless to compel personal attendance and obedience to rules of chancery courts. It has been repeatedly held in equity that a party in contempt will not be heard to make any defense or to take any affirmative steps in the particular litigation, **except only such as are necessary to his defense against the charge of contempt, until he has purged himself of such charge.**

See Haskell v. Sullivan, 31 Mo. 435, where defendant was subpoenaed to attend a trial as witness for the plaintiff and upon failure of defendant to attend the Court on motion struck out the answer of defendant and rendered judgment for plaintiff.

One of the objects of this bill is to avoid multiplicity of suits, to insure a continuous proceeding, and the grant of the prayer complained of may be necessary to insure the administration of justice in a manner befitting the dignity of a court.

Replying to the statement that cases cited by appellant are not in point.

The cases cited in appellant's brief which appellee declares (pages 39 and 40, brief of appellee) are "not in point", illustrate the application of certain principles. The able attorneys for the appellee say: "It may be our weakness, but we are unable to see the relevancy of the above cases to the present case." There is no weakness in the able counsel for the appellee, ex-

cept the weakness of remarkable ability in evasion and of resolute exercise of strength of will in closing their eyes to everything except that which may be turned to their account. At the risk of being considered unnecessarily prolix by the Court, we undertake to show why these cases are relevant and that they **do illustrate certain principles.** The case of

State ex rel. v. Gates, 190 Mo. 540:

The City of Kansas City, Mo., is a municipal corporation, as is the County of Dallas, it is in addition to being one of the agencies of State government, in every particular that the County of Dallas is an agency of the State government, a municipality, with greater powers than Dallas County. The Common Council is much more of a legislative body than is the County Court of Dallas County. It deals ordinarily with thousands of dollars worth of property where Dallas County deals with dollars; its action affects thousands of persons, where the action of the County Court of Dallas County deals with dozens of persons. In its character of a governmental agency, its importance transcends that of the County Court of Dallas County almost beyond comparison. In this Gates case the Supreme Court of Missouri subjected the city council to judicial control and most positively declared that ministerial and administrative functions were not exempt from judicial control. The appellee seeks exemption in this suit from judicial control in a matter which, we show, is purely ministerial—as to the performance of which we show the county officers have **no discretion—because the law of the State and the law by and under which they hold their offices requires the performance of their acts.** To say that such a case, so decided, is

not relevant to this controversy is to deny the real value of precedent.

Givens v. Daviess County, Mo., 107 Mo. 608, was "simply an action on account due by the county" as appellee says, but it was simply something much more. The laws of Missouri required all claims to be first presented to the County Court, R. S. 1879, Secs. 1210-18. This case holds that an action in the Circuit Court (which is the court of general jurisdiction in Missouri) and a judgment of said Circuit Court, dispensed with the necessity of first presenting the demand to the County Court.

This case illustrates the point that a judgment upon bonds against the county in the State Circuit Court would also dispense with necessity for any prior action by the County Court, and, arguendo, in the Federal court in a controversy over which the Federal court has jurisdiction, as in this case, the same result would follow as in the State court.

Seibert v. Lewis, 122 U. S. 284, is a very relevant and material case to the controversy here. The Seibert case holds that laws in force at the time the Legislature authorized the creation of the debt constitute a part of the contract, that laws prescribing the remedy, if conferring any valuable right to the creditor, cannot be repealed; that while the creditor may be, and is, entitled to any enlargement of the remedy, his remedies cannot be materially curtailed or diminished; and that agencies subsequently created may be designated to carry out the remedies originally given, although the Legislature may since have attempted to repeal the laws creating such remedies.

This, we believe, is an illustration of the Court practically designating other persons—officers other than

those elected by the people of a county to enforce the rights originally created.

The case of

Street R. R. v. Hart, 114 U. S. 654,

applied ordinary garnishment proceedings to funds of a great city, which funds were not dedicated, by contract, as here, to the particular debt, in satisfaction of payment of a general judgment. This was a remarkable interference with the fiscal arrangements of a great municipality, and deprived that city of a large sum probably required for other purposes **against the will of the representatives of the city.** It applied to that municipal corporation, without restriction or qualification, the same rules applicable to a private corporation. Was not this proceeding as much an interference with the "sovereign powers" of the great State of Louisiana, and **much more** than is the proceeding here an interference with any powers of the State of Missouri?

The case of

U. S. v. Port of Mobile, 12 Fed. Rep. 768,

and

Deveraux v. Brownville, 29 Federal Rep. 742,

both illustrate the points contended for by appellant in this case, that **WHEN THE LAW OF THE STATE PROVIDES FOR THE CREATION OF A DEBT TO BE PAID OUT OF A FUND TO BE RAISED BY TAXATION, AND THE DEBT IS CREATED IN ACCORDANCE WITH THE LAW THAT THE ABOLISHMENT EVEN BY** the solemn act of the Legislature itself, **OF ALL** of the agencies originally created for **the raising of the fund** to pay the **debt** cannot defeat the right of the **creditor to payment;** and that any subsequent agency created, **even though** the **Legisla-**

ture had expressly **PROHIBITED** the performance of the act, must perform the necessary **ACTS**. **Is not this, practically, the designation, by the judiciary, of the instruments to perform? Does not the Court thereby declare that it is the law and not the ministerial or clericacl act, which grants the remedy?**

If these be not precedents illustrating the application of principles and denying the effect of the contention of the appellee, then **we** confess to a weakness of understanding of what really are precedents.

State v. Middle Kittitas Irrigation District, 106 Pacific Rep. 203.

Appellee again repeats the erroneous statement that this decision was under **express authority** of the **Statute of Washington. We can only beg the Court to read the statute.** Counsel who say that the statute of Washington contains "**EXPRESS** authority", while denying the effect of the Missouri statutes, must presume that the Court will not examine the authorities cited.

Stansell v. Levee Board, 13 Fed. 846.

It is true that the Legislature of Mississippi had provided in the act creating the district that the improved lands should be assessed, in one county, at $30, and in another county at $20 per acre; that the unimproved lands should be assessed, in one county at $3, and, in another county, at $5 per acre; and that the tax "hereby levied" should be 2% on the valuation, but the Legislature did not designate what lands were improved and what lands were unimproved.

The levy declared by the Mississippi Legislature was no more certain than the levy declared in the present case by the State of Missouri. In the case at bar the

levy was fixed by the Legislature, the duty was expressly cast to levy and the limitation upon the special tax fixed; the basis was fixed as the assessment for state and county purposes, which is just as certain as in the Mississippi case. In the Mississippi case when the lands were classified as "improved" or "unimproved", the proportion became fixed and certain—a mere ministerial calculation. In the case at bar, when the assessment is made the proportion which each taxpayer is to pay, **is just as fixed and certain.**

Supervisors v. Rogers, 7 Wall. 175.

We are quite certain that a careful examination of the Iowa statute under which the proceeding in Supervisors v. Rogers was sustained, will convince this Court that the Iowa statute nowhere specially referred **to any county, nor to any matter of taxation.** In no respect does the Iowa statute confer upon the judiciary control over taxation, as do the Missouri statutes. The County of Lee was treated just as an ordinary litigant, just as a **private corporation would have been, and the collection of taxes was treated just as the collection of ordinary assets of a private corporation would have been treated.** To say that the Iowa statute **authorized "interference"** with agents of a county in matters of taxation and the Missouri statutes do not, is simply an abuse of the use of words. It is, palpably, an attempt to evade the compelling force of this precedent. The decree in Supervisors v. Rogers must have been sustained upon the ground that the Federal court could enforce its jurisdiction by writs agreeable to the usages and principles of law, and the Court practically decided that a general state statute permitting performance by a

substitute was applicable to taxation matters and to officers of a county, although they were not named.

Upon this principle why are the agents of the defendant county not subject to the provisions of Rule 8 of the Supreme Court—when the State law expressly requires specific performance by **mandamus or otherwise** of the particular acts required to be done by law?

The Iowa statute offered not one-hundredth part of the ground in reason for the action of the Court as is offered here. For, in Missouri, all of the objections which would have been tenable in Iowa, that the proceeding would be an invasion, by the judiciary, of the powers of other departments of government, are met and overcome by the long course of legislative enactment and judicial construction giving the judiciary complete control over matters of taxation. In Missouri, it may truthfully be said, the whole administration and enforcement of revenue and taxation are judicial functions, and not executive or legislative, when, as here, the Legislature has authorized the creation of the debt and the levy of the tax—the County Court itself was, at the time of the creation of this debt, a minor branch of the judicial department—triers of petty individual controversies—and subject at all times and in every particular, to the control of the Circuit Court. And now the whole method of enforcement of taxes against individual taxpayers is by suit in the Circuit Court, and the sheriff, as the officer of the court, enforces the collection of taxes—when suit is necessary to be brought.

In **Labette Co. Co. Com. v. Moulton,** 112 U. S. 217, we insist that the statute law "required certain acts to be performed by the township trustee before the

County Judges were **(under THE STATUTE law)** required to make **the levy of tax,** but the Supreme Court of the United States said this statutory act of the **township trustee WAS NOT NECESSARY TO THE VALID LEVY OF THE TAX.**

Upon principle, does not this hold that it is the **law** which gives vitality to the tax, and not the act or omission to act of a particular official?

The compromise feature of the petition referred to in the opinion of Judge McPherson:

While Judge McPherson (Section 57, page 38, Transcript of Record), in his opinion, comments upon the desirability of a compromise, or an adjustment of the indebtedness by arbitration, he dismisses that feature of the bill by saying:

> "* * * But as anything in the nature of an agreement has not been disclosed, if made, this court can only consider the questions as presented by the bill of complaint and the motion to dismiss the case."

And then proceeds to destroy, if his decision be not reversed, all chances for a compromise, by dismissing the petition! This feature of the petition was incorporated therein for the purpose of securing first the assent of all of the creditors to a submission to arbitration, which would then, upon the agreement of the defendant county, become a valid submission. The final adjustment of this controversy can probably only be accomplished by arbitration, for a readjustment and refunding of the debt requires the acquiescence of the people of the county. Until the agents of the county are convinced, however, that they may not evade payment and enforcement of all liability by the simple

expedient of treating writs of the United States courts with contempt and then escaping from the county to avoid arrest, it is hardly likely that any compromise can be effected.

The Missouri Statutes provide for a final determination of all matters of law and fact by submission to arbitration. Practically all of the creditors were ready to join in such submission when this petition was dismissed.

An Error of Fact in Opinion of Trial Judge.

The trial judge in his opinion made by reference a part of the decree, says:

> "As I understand it, little or no part of the work was done on the railroad and the people received no benefit therefrom; but the bonds having been sold were held to be a legal liability of the county, resulting in these judgments."

There is nothing in the record of this or any other case from which the trial judge could have gained the understanding that "little or no part of the work was done on the railroad." This understanding was gotten from some source outside of the record and is not based upon the facts. It is a matter of common knowledge that this railroad was graded, bridges built and ties laid when the panic of 1873 came on. Laclede and Dallas Counties were the holders of the capital stock for which they had issued the bonds of the counties and the proceeds of the sale of the bonds paid for the work that was done. **Campbell's Gazeteer of Missouri,** published in 1875, shows, at page 184, that the Laclede and Fort Scott Railroad had been graded from Lebanon in Laclede County for 50 miles to the west, extending

thirty-six miles through Dallas County. The Missouri State Auditor's Report for 1873 shows that $235,000 of bonds of Dallas County had been issued for this purpose, that the bonds were registered with the State Auditor and no contest of the bonds is shown by the State Auditor's report at that time. Counsel for the appellee, in closing their brief, also go outside of the record to remark: "In closing this brief for appellee, **grievously burdened by the act of unfaithful officers**", etc. There is nothing in the record to show that the County "has been grievously burdened by the act of unfaithful officials". There has never been a scintilla of evidence introduced at any time that the early officials were unfaithful and the county has been burdened only by the efforts of the officials who, unfaithful to their sworn duty to perform what the law commands, have exercised much ingenuity and untiring industry in escaping process of courts and evading the obligations to the creditors. Appellant respectfully submits that the record, as made up, which accords with the facts, shows that the creditors have been subjected to difficulties in enforcement of their lawful and just demands heretofore unheard of in civilized communities.

In Conclusion.

Here are definitely ascertained owners of property liable, under the law, to ratable definite contribution to a fund certain; here are certain creditors entitled ratably to distribution of said fund; here the sovereign power of the State under the law has authorized the imposition of the charge; the courts have construed the law and have definitely ascertained and determined the respective rights of creditors and debtors; here are the

agents of a corporation, which corporation, in this regard, is entitled to no more exemption from control by the courts than a private corporation, which agents of such corporation by the **omission** of duties cast upon them by the law (which omission, itself, is in law, a fraud upon the creditor) succeed in defeating the jurisdiction of courts, impairing the obligation of contracts and destroying the rights solemnly adjudicated —and we are told that courts can afford no redress!

It has been said we must appeal to the Legislature for relief! What relief can the Legislature grant us further than it has already granted? If the Legislature had attempted to deny us relief, had solemnly passed an act authorizing these agents to omit to perform their duties, such act would be held by the courts to be void. When the Legislature does not so attempt to destroy the rights of plaintiff, but has conferred and confirmed them, and has, by positive enactment charged the judiciary with the duty of enforcing these contractual rights, would it not be a blot upon jurisprudence to say that in a court where substance, and not form, controls, justice cannot be administered and redress obtained?

Upon the facts stated had Parliament authorized a parish, as the Legislature has authorized the county, to create the debt and levy the tax required, would the High Court of Chancery, of the 18th Century, or since, deny specific performance? Upon the facts stated, if this litigation were in the Circuit Court of the State of Missouri, could such court, under its own decisions, deny effective relief and specific performance by *mandamus* or **otherwise**?

Therefore, this Court having succeeded to all of the powers of the Chancery Court and having lawful juris-

diction over the persons and the subject-matter, should, in the enforcement of its jurisdiction and under the express provisions of Sec. 262, Judicial Code, and Rule 8 of the Supreme Court, enforce specific performance, and in the manner prayed, for such would be agreeable "to the usages and principles of law" of both the Chancery Court of England and of the courts of Missouri.

HARRY J. CANTWELL,
Solicitor for Plaintiff.

APPENDIX.

Showing parts of such Statutes of Missouri as are applicable to this controversy:

The Charter of the Railroad Co.

"Section 1. That a company is hereby incorporated to be called the Laclede and Fort Scott Railroad Company, the capital stock of which shall be six millions of dollars, to be divided into shares of one hundred dollars each, the holders whereof, their successors or assigns, shall constitute and be a body politic and corporate, in law and in fact, by the name and style aforesaid; and by that name shall have perpetual succession; may sue and be sued; plead and be impleaded; defend and be defended against; may make and use a common seal, and break and change the same, and shall be able in law and equity to make contracts; may make, hold, use, possess and enjoy the fee simple or other title in and to any real estate, and may sell and dispose of the same; may make by-laws, rules and regulations proper for carrying into effect the provisions of this act, not repugnant to the Constitution or laws of the United States or of this state, and shall have the usual and necessary powers of corporations for such purposes."

* * * * * * * *

"Sec. 7. Said company shall have full power to survey, mark, locate, construct, maintain and operate a railroad, commencing at some point in Laclede County, by the most direct and practicable route through the Counties of Laclede, Dallas, Polk, Cedar and Vernon, in the direction of Fort Scott in Kansas Territory, and for that purpose may hold a strip of land not exceeding a hundred feet in width, with as many tracks as the Presi-

dent and Directors may deem necessary: Provided, That in passing hills or valleys the said company are authorized to extend such width so far as may be necessary to effect such object; and may also hold sufficient land for the erection of depots, work houses, shops and water stations, and may select such route as may be deemed most advantageous, and may extend branch railroads to any point in any of the counties through which the said railroad may be located."

* * * * * * * *

"Sec. 14. It shall be lawful for the County Court of any county in the State to subscribe to the stock of said company, or invest its three per cent fund or any other internal improvement fund belonging to the county, as stock in said road; and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay for the same, and to take proper steps to protect the interests of the county; may appoint an agent to represent the county, vote for it, and receive its dividends. Any incorporated city, town or company may subscribe to the stock in said railroad company, and appoint an agent to represent its interests, give its votes, and receive dividends, and may take proper steps to guard and protect the interests of the said city, town, or company."

* * * * * * * *

"Sec. 21. Said company shall have power to receive and hold loans, gifts, grants and donations of lands, money or bonds, in any quantity from any county, State or government, or from any Indian tribe; it shall have power to hold mortgages on real or personal property to any extent, and to sell, convey, pledge, loan, mortgage, or otherwise dispose of said lands, bonds, money, or other prop-

erty, or any part thereof; and to sell, barter, loan or pledge its own bonds, and apply the proceeds of the same to the construction of the road."

"Sec. 22. None of the provisions of the act entitled, 'An act concerning corporations' shall apply to said Laclede and Fort Scott Railroad Company except Sections four, five, seventeen and twenty-three of said act."

* * * * * * * *

"This act to take effect and be in force from and after its passage.

Approved January 11, 1860."

Note: The specific "act concerning corporations" as to the most of which this railroad is excepted from the operation of, are not material (as they relate to banking and corporations other than railroad). All other statutes of the State were not excepted, and this charter was granted with such statutes in force, and such statutes are, therefore, a part of this special act, particularly:

"Act to authorize the formation of railroad associations and to regulate the same," being Chap. 39, R. S. 1855, page 404, Vol. I, Revised Stat. of Mo. 1855, the material parts of which are:

"Sec. 30. It shall be lawful for the County Court of any county, and the City Council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this State, and the County Court or City Council subscribing, or proposing to subscribe, to such capital stock, may, for information, cause an election to be held, to ascertain the sense of the taxpayers of such county or such city as to such subscriptions, and as to whether the same shall be paid by

issues of county or city bonds, as the case may be, or by taxation.

"Sec. 31. Upon the making of such subscription by any County Court or city, as provided for in the previous section, such county or city shall thereupon become like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this act, or by the charter of the company in which such subscription shall be made. And in order to raise funds to pay the installments which may be called for, from time to time, by the board of directors of such railroad, **it shall be the duty** of the County Court or City Council making such subscription to issue their bonds, or levy a special tax upon all property and taxables made taxable by law for state and county purposes, and upon the actual capital that all merchants and grocers may have invested in business in the county or city, to pay such installments, **to be kept apart from other funds, and appropriated to no other purpose** than the payment of such subscription, but the total amount of tax levied for railroad purposes in any one year, in any county or city, shall not exceed thirty per centum of the subscription made by such county or city" * * *.

"And for the purpose of levying and collecting the tax aforesaid the same books may be used as employed by the assessor of taxes for state or county purposes, and the last previous assessment for those purposes shall be taken.

"Sec. 32. For all such taxes levied and collected for railroad purposes the County Court or the City Council, as the case may be, shall cause to be issued and delivered to the persons paying such special tax a certificate for the amounts thereof paid; and such certificate shall state the county or

city in which, and the railroad for which, the tax was collected, and shall be transferable by the holders thereof, and convertible into stock of such railroad, whenever presented in amounts equal to one or more entire shares of the stock of such railroad, to such proper officer of such County Court or City Council as shall be **designated by such** court or council, by transfer to be made by such officer, in conformity with the by-laws of the railroad company" * * *.

"The assessment, collection and payment of the taxes authorized by this section shall be provided for and enforced as any other taxes for county or **highway** purposes, and the County Court or City Council may require additional security from the collector" * * *.

"Sec. 35. Any County Court refusing to perform any of the duties required of it by this act may be proceeded against by writ of *mandamus*, to be issued out of the Criminal Court for the county so refusing."

* * * * * * * *

"Sec. 56. The Legislature may at any time amend this act, but such alteration or amendment shall not impair the rights of companies previously organized, or take away or impair any remedy given against such corporation, its stockholders or officers for any liability which shall have been previously incurred" * * *.

"Sec. 57. All existing railroad corporations within this state, and such as **now or may be hereafter chartered**, shall, respectively, have and possess all the powers and privileges contained in this act; and they shall be subject to all duties, liabilities and provisions not inconsistent with the provisions of their charter contained in this act."

These provisions are repeated as Sections 18, 19, 20 and 21 of Chap. 63 of R. S. of 1865, except that Sec. 22 of Chap. 63 (1865) provides:

> "Any County Court refusing to perform any of the duties required of it by this chapter may be proceeded against by writ of *mandamus* to be served out of the Circuit Court for the county so refusing."

And Sections 18, 19 and 20, Article II, Wagner's Statutes of Mo. 1890, repeat the above provisions and adds:

Sec. 21 (page 306):

> "Any County Court, city or town which has heretofore subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the County Court or City or Town Council shall have all the rights and powers to provide funds to pay such subscription as are granted to County Courts and cities by this chapter, and may levy a special tax to pay the interest on their bonds or to provide a sinking fund to pay the principal."

And provides, Sec. 22, Act 1870, March 24th:

> "Any County Court, City Council or trustees of any town, refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of *mandamus*, to be sued out of the Circuit Court of the county."

And Section 48:

> "All existing railroad corporations within this state, and such as may be hereafter chartered or

formed, shall, respectively, have and possess all the powers contained in this chapter; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained."

There is no provision in these laws requiring that the railroad tax shall be collected or levied or assessed by any particular officer. The only provision is that for the purpose of levying and collecting the tax aforesaid the same books **MAY** be used as employed by the assessor "of taxes for taxes for state and county purposes."

Sec. 31, Chap. 39, R. S. 1855.

In Wagner Mo. Statutes 1870, page 305, however, it is provided (Act of March 24th, 1870) * * *:

"The assessment, collection and payment of the taxes authorized by this section shall be provided for and enforced as any other taxes for county or **highway purposes.**"

JUDICIAL POWER.

Sec. 8, Chap. 47, page 533, R. S. 1855:

"The circuit courts, in the respective counties in which they may be held, shall have power and jurisdiction as follows:

* * * * * * * *

"**First, criminal causes.**

"Second. Exclusive original jurisdiction in all civil cases which shall not be cognizable before the county courts and justices of the peace, and not otherwise provided by law.

"Third. Concurrent original jurisdiction with justices of the peace in all actions founded upon

contract when the debt or balance due, or damages claimed, exclusive of interest, shall exceed fifty dollars, and not exceed ninety dollars, etc. * * *

"Fourth. Appellate jurisdiction from the judgments and **orders of county courts** and **justices of the peace, in all cases not expressly prohibited by law, and shall possess a superintending control over them**" * * *.

Sec. 36, Chap. 47, page 538, R. S. Mo. 1855:

"The courts hereby established shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law."

This section is immediately followed by the following:

Sec. 37, Chap. 47, page 538, R. S. Mo. 1855:

"Where there is no sheriff **or other ministerial officer qualified to act**, or where **they are interested or prejudiced**, the court may appoint one or more persons to execute their process, and **perform any other duty of such officer**, who shall be entitled to such fees for their services in each case as are allowed by law to sheriffs in like cases."

Artirle V, Constitution of 1820, page 77, R. S. 1855:

"Sec. 6. The Circuit Court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law; and exclusive original jurisdiction in all civil cases which shall not be cognizable before justices of the peace until otherwise directed by the General Assembly.

* * * * * * * *

"Sec. 8. The Circuit Court shall exercise a superintending control over all such inferior tribu-

nals as the General Assembly may establish, and over justices of the peace in each county in their respective circuit."

"Sec. 11. Until the General Assembly shall deem it expedient to establish inferior courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the Court of Chancery in such manner and under such restrictions as shall be prescribed by law."

Sec. 7, Article XIII, page 83:

"That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property or character."

Counties.

Statutes of Missouri applicable thereto:

Sec. 6, Chap. 43, R. S. 1855, page 503, **actions against a county:**

"All actions, local or transitory, against any county, may be commenced and prosecuted to **final judgment and execution**, in the Circuit Court of the county against which the action is brought; but no courthouse, jail, clerk's office or any other public building, or the lot of ground on which they may be situated, shall be subject to the execution of any creditor of such county."

Note: The above is the only limitation upon the power of the judiciary to subject a county to all remedies to which an individual may be subjected.

SUBSTITUTES.

Statutes of Missouri providing for appointment of substitutes for certain county officers by the judiciary.

COUNTY TREASURER.

Section 4, Chap. 38, page 226, G. S. Mo. 1865:

"In case of vacancy in the office of Treasurer, by death, resignation, removal or otherwise, it shall be the duty of the County Court of the proper county to fill such vacancy by appointment and the person so appointed shall hold his office until the next general election for said county, and until his successor is elected and qualified."

COUNTY ATTORNEY.

Sec. 31, Chap. 18, page ...., G. S. Mo. 1865:

"If at any time there should be a vacancy in the office of county attorney for any county, it shall be the duty of the **Judge** or Justice of the Peace before whom any cause, as hereinbefore provided for, shall be pending, to appoint some competent person to represent the State in such cause and fix his compensation therefor, which shall be taxed as cost in such cause."

CLERK.

Sec. 6, Chap. 26, page 335, R. S. Mo. 1855, provides:

"If from any cause there be a vacancy in the office of Clerk of the Circuit Court, or County Court, Court of Common Pleas, land court or criminal court, the Court or Judge or Judges thereof in vacation shall appoint some person to fill the vacancy until a successor be elected and qualified."

SHERIFF

is Ex-Officio Collector of the Revenue. Sec. 1, Chap. 135, page 1338, provides:

"Every sheriff hereafter elected (except the Sheriff of St. Louis County) shall be ex-officio col-

lector of the revenue within his county for two years, commencing on the first day of September next ensuing his election."

See Sec. 37, Chap. 47, above, which provides for substitute for sheriff by the court when he is interested or prejudiced.

SUBSTITUTES.

The **Assessor** (whose duty it is to fix valuations, which is certainly the most important duty connected with the levy of any kind of a tax) has performed his duties in the case at bar, but even this important office might under Missouri Statutes be filled by appointment of the judiciary.

Sec. 10, Chap. 135, page 1328, R. S. 1855, provides:

> "If no person be elected assessor, or if the person elected fail to take the oath and enter into the bond required of assessors, on or before the first day of November after his election, or after the time at which such assessor ought to have been elected, or if at any time there be a vacancy in the office of assessor, the County Court shall immediately appoint an assessor for that year; and in default thereof, **the clerk of such court shall make such appointment** in vacation."

And section 16, same chapter, page 1329, provides:

> "Every assessor who shall fail to perform any duty enjoined upon him by law, in the time prescribed, may be removed from office by the County Court, who shall appoint another in his stead."

The County Court is in all respects subject to the control of the Circuit Court (see constitutional provisions and statutes above).

THE ASSESSMENT.

The method of assessing or valuing property for taxation has changed in but slight details. It is practically the same as it was when this contract was made.

The assessor lists the personal property and real estate in a book and places a valuation against each tract of real estate and against the personal property of each owner. This is called the assessment.

LEVY AND COLLECTION OF TAXES.

In 1870, and prior thereto, the county court was empowered to fix the rate for county and road purposes, the provisions relating to the levy were:

Sec. 76, page 1196, Wagner's Mo. Statutes 1870:

> "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes" * * *.

Sec. 77:

> "As soon as may be after the assessor's books shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the sum necessary to be raised for county purposes, and fix the rates of taxes on the several subjects of taxation, so as to raise the required sum, and the same to be entered in proper columns in the tax book."

The tax book was then delivered to the sheriff, who was ex-officio collector, for collection, and

Sec. 26, page 1188, provides:

> "The collectors shall diligently endeavor and use all lawful means to collect all the taxes which

they are required to collect in their respective counties; and to that end they shall have power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are, or may be required to be seized and sold under execution, issued on judgments at law, and no property shall be exempt from seizure or sale for taxes; but no such seizure and sale of goods shall be made until the collector has demanded payment of the tax, either by personal application to the party liable to pay the same, or by visiting his place of abode for that purpose."

Sec. 42, page 1190 (*ibid*), provides:

"Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make two lists thereof, one to be called 'the personal delinquent list', in which shall be stated the names of all persons owing taxes on polls and personal property, when taxes cannot be collected, alphabetically arranged, with the amount due from each, and the other to be called 'the land delinquent list', in which shall be stated the names of all persons owing taxes on lands and town lots, where taxes cannot be collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract or town lot" * * *.

Sec. 43 provides for posting copies of the delinquent lists.

Sec. 88 provides for submitting the delinquent list to the County Court, and for notice by the sheriff (ex-officio collector) that he will apply for an order of sale of the lands on the delinquent tax list for taxes.

A summary judgment without notice to the land-owner other than the published notices is provided against the tracts of land delinquent, but Sec. 94 provides:

> * * * "Any person aggrieved by any decision of said court in such cases shall have the right of appeal to the Circuit Court."

The laws then provide for a sale of said lands for said taxes as a proceeding *in rem*, with right of redemption by owner, on certain conditions, for two years thereafter.

As to all officers charged with performance of any or all of these acts, as appears by the statutes before quoted, the judicial power had the right under the laws to appoint substitutes and had supervising control over every act.

The method of assessment is now in Missouri practically the same, the taxes are extended after the calculation of the rate in the same manner as before, the books are delivered to the collector and he now returns a delinquent list of the unpaid taxes. All of these acts are practically the same, but for county taxes, instead of a proceeding *in rem* against real estate on which the tax which was delinquent, as was the method prior to 1879, a formal suit is now brought by the collector in the **CIRCUIT COURT** against the owner of the land for the tax and penalty, a special lien is decreed against the particular tract, and the lien enforced by sale under the direction of the **Circuit Court**.

Under the present statutes of Missouri, which are fully recited in Seibert v. Lewis, 122 Mo. 284, taxes other than ordinary taxes for state and county revenue

are levied under direction of the Circuit Court, which is the court of general original jurisdiction.

As it has been repeatedly held that these sections cannot limit or abridge the right of the owner of a judgment based upon bonds issued prior to these laws, to all remedies in existence at the time the bonds were issued, it is deemed unnecessary to print all of these statutes in this brief. In one particular, however, these later statutes are relevant.

Sec. 11417, R. S. of Mo. 1909:

> "* * * **And such Circuit Court or Judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this State, shall make an order directed to the County Court of such county, commanding such court to have assessed, levied and collected such other tax or taxes and shall enforce** such order by
>
> **Mandamus or Otherwise.**"

This statute certainly confers upon the judiciary of the State power to enforce—to have assessed, levied and collected—a tax which the judgment of the U. S. Court has finally declared to be a legal tax, and for this court to secure enforcement of the tax by means other than *mandamus* would certainly be "agreeable to the principles and usages of law," particularly when the **assessment** is made and the Supreme Court of Missouri holds, as it does in State *ex rel.* Brown v. Wilson, 216 Mo. 215 (*l. c.* 286-7):

> "This Court has many times held that when an assessor makes out his assessor's books, jurisdiction attaches, and the rest of the proceedings are only directory."

CIRCUIT COURT HAS POWER TO ACT IN ALL MATTERS WHEN JUDGES OF COUNTY ARE INTERESTED IN PROCEEDING.

Sec. 13, Article 5, page 441, Wagner's Mo. Statutes, 1870:

> "If a majority of the justices of the County Court **shall be interested in any cause or proceeding before them,** or related to either party, the same shall be certified with the original papers, to the **Circuit Court of the County,** which shall proceed thereon to **final judgment and determination,** in the **like manner as the County Court should have done.**"

MISSOURI STATUTES AUTHORIZING APPOINTMENT OF RECEIVERS.

The Statutes of Missouri in force at the time the bonds were issued relating to appointment of receivers were:

Sec. 52, Article 9 (page 1048), Wagner's Mo. Statutes, 1870, same section in G. S. 1865:

> "The Court shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in Court, or that may be the subject of a tender subject to the order of Court."

The Statute on Executions, in force at time the debt was created, **did not exempt the county from the operation of such statute,** and it **exempted ONLY** certain property of the county therein specially stated as follows:

Sec. 10, Chapter 55 (page 604), Wagner's Mo. Statutes, 1870:

"All court houses, jails, clerks' offices and **other public buildings**, and the lots of ground on which they stand, shall be exempt from attachment and execution, when owned by the county in which they are situated, or any municipal corporation, also all burial grounds specified in chapter eleven of these statutes."

Sec. 15, same chapter (page 605), provides:

"Nothing contained in this chapter shall be construed so as to exempt any property from seizure and sale, for the payment of taxes due this State, or any city or county thereof."

Sec. 20, same chapter (page 606), provides:

"All account books, accounts, notes, bills, bonds, certificates of deposit, and other evidences of debt, belonging to a debtor, shall be liable to seizure, and when seized, shall be placed in the hands of a suitable person, to be appointed by the Court, or Judge thereof, in vacation, as a **receiver**, who shall take the same oath, execute like bond, have and perform the same powers and duties, and be subject, with his securities, to the same provisions and penalties, in all respects, as in the case of a receiver and his securities, appointed in virtue of the statute providing for suits by attachment."

Sec. 21:

"When a receiver is not appointed, the officer holding the execution shall have all the powers and perform all the duties of a receiver, under the preceding section, and may commence and maintain actions in his name, **as such officer, on debts or**

evidence of debts seized. He may, in such cases, be required to give security other than his official bond; but if not so required, the sureties in his official bond shall be held liable, as in other cases of his official action."

And under the attachment chapter, appear the following provisions; Sec. 18, Chap. 11, page 184:

"The original writ of attachment shall be directed to the Sheriff or other officer authorized by law to serve the same, and shall command him to attach the lands, tenements, goods, chattels, **rights**, moneys, **credits**, evidences of debt and effects of the defendant, or so much thereof as will be sufficient to satisfy the plaintiff's claim, as sworn to, with interest and costs, and to summon as garnishees all persons in whose hands or possession any personal property, rights, credits, evidences of debt, effects or money of the defendant, may be, or who may be, named by the plaintiff, or his attorney, as garnishee."

Sec. 19:

"Under an attachment, the officer shall be authorized to seize, as attachable property, the defendant's account books, accounts, notes, bills of exchange, bonds, certificates of deposit, and other evidences of debt, as well as his other property, real, personal or mixed," etc.

Sec. 24, paragraph V, page 186, provides:

"When the credits of the defendant are to be attached, the officer shall declare to the debtor of the defendant, that he attaches in his hands all debts due from him to the defendant, or so much thereof as shall be sufficient to satisfy the debt

and interest, or damages and costs and summon such debtor as garnishee."

Appointment of a Receiver, Sec. 30, Chap. 11, page 187 (*Ibid.*):

> "The Court, or in vacation, the Judge, may in a proper case, on the application of a plaintiff, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall enter into bond to the State of Missouri, in such sum as the Court or Judge may direct, and with security, approved by the Court or Judge, for the faithful performance of his duty as receiver, and that he will pay over all money and account for all property which may come into his hands in virtue of his appointment, at such times and in such manner as the Court may direct. This bond may be sued on, in the name of the State, at the instance, and to the use of, the party injured."

The materiality of the above sections in the present case is that from the drastic proceedings above provided to be accomplished, the **COUNTY WAS NOT EXEMPT**. There is no provision of the statutes, in force at that time, which limits the appointment of Receivers to private corporations. Therefore, the appointment of a Receiver for this county would be: "Agreeable to the principles and usages of law."